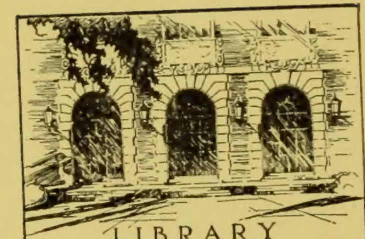

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WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES

BY

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A. B. St. Olaf College, 1914
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THESIS

Submitted in Partial Fulfillment of the Requirements for the

Degree of

DOCTOR OF PHILOSOPHY

IN POLITICAL SCIENCE

IN

THE GRADUATE SCHOOL

OF THE

UNIVERSITY OF ILLINOIS

1920

1920
B45

UNIVERSITY OF ILLINOIS

THE GRADUATE SCHOOL

May 11 1920

I HEREBY RECOMMEND THAT THE THESIS PREPARED UNDER MY

SUPERVISION BY Clarence Arthur Berdahl

ENTITLED War Powers of the Executive in the United States

BE ACCEPTED AS FULFILLING THIS PART OF THE REQUIREMENTS FOR

THE DEGREE OF Doctor of Philosophy

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PREFACE.

The powers of the Executive relating to war have received surprisingly little attention in treatises and commentaries on the Constitution. They are usually passed by with little more than a repetition of the constitutional provision making the President the Commander-in-Chief of the armed forces of the nation. This study is an attempt to describe these war powers more fully and systematically than has heretofore been done. For this purpose, the term "war powers" has been interpreted somewhat liberally, so as to include not only the powers that may be exercised during the actual conduct of war, but also those that relate to the initiation and termination of war and to the reconstruction period following war. It has been necessary, in great measure, to work over old material and to make use of familiar historical incidents. Nevertheless, it is hoped that something has been contributed to show more clearly the comprehensive scope and the almost unlimited nature of this phase of the President's power.

The writer is indebted to members of the Seminar, and more especially to Professors Garner and Fairlie, for valuable suggestions and kindly criticism. He is alone responsible for any errors of fact or conclusion.

University of Illinois
April, 1920.

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"It is difficult to describe any single part of a great governmental system without describing the whole of it. Governments are living things and operate as organic wholes."

--- Woodrow Wilson.

Constitutional Government
in the United States.

Chapter I.

Introduction.

"The executive power shall be vested in a President of the United States of America."[1] The language here used by the Constitution in describing the executive power in the government of the United States is strikingly different from that describing the general power of either of the other two great departments. The article dealing with the Legislative department uses the words, "All legislative powers herein granted . . ,"[2] showing that the following specified powers clearly constitute a limitation on the possible claims of that department to power; while the article devoted to the Judiciary also expressly states that the judicial power of the United States "shall extend to" certain enumerated cases,[3] thereby obviously excluding all other cases over which the judiciary might otherwise claim jurisdiction.

The lack of such express limitations in the article dealing with the Executive has led to some difference of opinion as to whether the executive power vested in the President by the Constitution is defined and limited by the following specified powers, or whether it includes other powers not enumerated but naturally executive in character. Even if the former interpretation of the Constitution is accepted as correct, the conception of the term "executive power" still remains somewhat vague, since several of the expressly enumerated powers of the President, such as his powers as Commander-in-Chief and his power to see that the laws are executed, are in themselves undefined in the Constitution, uncertain as to their

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[1] Constitution, Art. II, Sec. 1.
[2] Ibid., Art. I, Sec. 1.
[3] Ibid., Art. III, Sec. 2.

limits, and therefore subject to various interpretations.

The article dealing with the Executive has therefore been characterized as "the most defective part of the Constitution", its loose and general expressions enabling the President, by implication and construction, "either to neglect his duties or to enlarge his powers."[4] A distinguished historian says that while our Constitution in the main is of the rigid type, its flexible character is shown in the provisions conferring the powers and defining the duties of the Executive. "Everything is clearly stated, but the statements do not go beyond the elementary." Pointing out that while the Constitution did not authorize certain of Lincoln's acts, neither did it expressly forbid them, he holds that there is "room for inference, a chance for development, and an opportunity for a strong man to imprint his character upon the office."[5] Somewhat the same idea was expressed by President Wilson some years ago when he wrote: "The President is at liberty, both in law and conscience, to be as big a man as he can. His capacity will set the limit."[6]

A doctrine of constitutional construction -- the so-called Wilson-Roosevelt doctrine with regard to the control of matters within the "twilight zone" between the national and state jurisdictions[7] -- was translated by President Roosevelt into terms of in-

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[4] View of Secretary of State Upshur. See his more extended statement, quoted in Taft, Our Chief Magistrate and His Powers, 141.

[5] Rhodes, Historical Essays, 204, 214.

[6] Constitutional Government in the United States, 70.

[7] First enunciated by James Wilson in 1785, recently advocated by President Roosevelt, and stated as follows: "That when a subject has been neither expressly excluded from the regulating power of the Federal Government, nor expressly placed within the exclusive control of the States, it may be regulated by Congress if it be, or become, a matter the regulation of which is of general importance to the whole nation, and at the same time a matter over which the States are, in practical fact, unable to exercise the necessary controlling power." Willoughby, On the Constitution, I, 47.

herent executive power. He said: "The most important factor in getting the right spirit in my Administration, next to insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers. My view was that every executive officer in high position was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well being of all our people, whenever and in whatever measure was necessary, unless prevented by direct constitutional or legislative prohibition."[8]

Roosevelt's theory of executive power is disputed, however, by equally eminent authority. Senator Rayner, one of the leading constitutional lawyers of his time, contended that the clause dealing with the executive power relates simply to the distribution of governmental functions, and should not be considered

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[8] Roosevelt, Autobiography, 388-389.

as a grant of power at all.[9] Professor Goodnow says that the holder of executive power "is for the most part to exercise the powers which have clearly been given to him by the Constitution, and the Constitution itself is regarded as a grant of power not otherwise possessed, rather than as a limitation of power already in existence."[10]

The Supreme Court has likewise not only repudiated the Wilson-Roosevelt doctrine of constitutional construction as being contrary to the 10th Amendment,[11] but it has also definitely refuted the Roosevelt theory of executive power. "We have no officers in this government," says the Court, "from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority."[12] It would therefore seem that ex-President Taft reflected the better opinion when he stated the true view of executive power to be "that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an Act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest . . . . The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his

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[9] Speech in U. S. Senate, Jan. 31, 1907. *Cong. Record*, XLI, Pt. II (59 Cong., 2 Sess.), 2010.

[10] *Principles of Constitutional Government*, 89.

[11] *Kansas v. Colorado*, 206 U. S., 46, 89-90, (1907). The 10th Amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[12] *The Floyd Acceptances*, 7 Wall., 666,676 (1868).

jurisdiction must be justified and vindicated by affirmative constitutional or statutory provisions or it does not exist."[13]

Although the weight of authority upholds the contention that executive power in the United States is limited definitely to the powers enumerated in the Constitution, or clearly implied therefrom, the interpretation of those enumerated powers is frequently such as to give to the President an extraordinary and practically undefined range of authority. Thus, for example, it has been authoritatively held that the President, under his power "to take care that the laws be faithfully executed," may undertake measures and exercise authority, for the enforcement of the law or the protection of federal rights, not specifically granted by Constitution or statute.[14] Other of the President's enumerated powers, such as his power as Commander-in-Chief and his power to receive and send ambassadors and ministers, are likewise subject to the same broad interpretation.

If the general conception of executive power in the United States is somewhat vague and open to various interpretations, that is especially true of the nature and extent of executive power with regard to war. It has rightly been said that "the domain of the executive power in time of war constitutes a sort of 'dark conti-

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[13] Our Chief Magistrate and His Powers, 139-140.

[14] In re Neagle, 135 U. S., 1, 63-64, 67 (1890). Cf. dissenting opinion, which held that such enforcement or protection "must proceed not from the President, but primarily from Congress", and that if Congress does not pass laws in reference to such matters, "there is not the slightest legal necessity out of which to imply any such power in the President." Ibid., 82, 83. See also view of Prof. Willoughby: "The obligation to take care that the laws of the United States are faithfully executed, is an obligation which is to be fulfilled by the exercise of those powers which the Constitution and Congress have seen fit to confer." On the Constitution, II, 1151.

nent' in our jurisprudence, the boundaries of which are undetermined."[15]

From the very beginning of our history as a nation, statesmen and commentators have held that since it is impossible to foresee what may be the exigencies or circumstances endangering the public safety, therefore "no constitutional shackles can wisely be imposed", and none are imposed upon the so-called war powers.[16] They have held that there are two distinct classes of powers under the Constitution -- the peace powers, which are subject to the restrictions of the Constitution, and the war powers, which are limited only by the laws and usages of nations,[17] and under which

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[15] J. W. Garner, in *Rev. de Droit Pub. et de la Sci. Pol.*, XXXV, 13 (Jan.-Mar., 1918).

[16] See argument of Hamilton, in *The Federalist*, No. 23 (Goldwin Smith ed., pp. 119-120). Cf. speech of Senator Sumner, in U. S. Senate, June 27, 1862: "Pray, Sir, where in the Constitution is any limitation of the War Powers? Let Senators who would limit them mention a single section, line, or phrase, which even hints at any limitation. . . The War Powers are derived from the Constitution, but, when once set in motion, *are without any restraint from the Constitution*; so that what is done in pursuance of them is at the same time *under* the Constitution and *outside* the Constitution. It is under the Constitution in the latitude with which it is conducted; but, whether under the Constitution or outside the Constitution, all that is done in pursuance of the War Powers is constitutional." *Works of Charles Sumner*, VII, 131-132. See also Fisher, *Trial of the Constitution*, 199.

[17] "There are, then, in the authority of Congress and of the Executive, two classes of powers, altogether different in their nature and often incompatible with each other -- the war power and the peace power. The *peace power* is limited by regulations and restricted by provisions prescribed within the Constitution itself. The *war power* is limited only by the laws and usages of nations. This power is tremendous; it is strictly constitutional, but *it breaks down every barrier so anxiously erected for the protection of liberty, of property and of life* . . . The powers of war are all regulated by the laws of nations, and are subject to no other limitations." Speech of John Quincy Adams, in House of Representatives, May 25, 1836. *Cong. Debates*, XII, Pt. IV (24 Cong., 1 Sess.), 4038, 4039.

the rights of peace may even be disregarded or curtailed.[18] They have asserted that the war power implies the right to do anything that may seem necessary to carry on the war successfully, even to the extent of performing otherwise unconstitutional acts.[19]

These claims with regard to the extent of the war power have also been sanctioned by the Supreme Court. Thus, in upholding the Confiscation Acts of the Civil War, the Court said: "If the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States; if, on the contrary, they are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the 5th and 6th Amendments. . . . Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately pros-

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[18] "But in bestowing upon the Government War Powers without limitation, they (the makers of the Constitution) embodied in the Constitution all the Rights of War as completely as if those rights had been severally set down and enumerated; and among the first of these is the right to disregard the Rights of Peace." Works of Charles Sumner, VII, 136-137.

"It seems to be pretty well settled by the common sense of mankind that when a nation is fighting for its existence it cannot be fettered by all the legal technicalities which obtain in time of peace." Rhodes, Historical Essays, 214.

"What is the effect of our entering upon the war? The effect is that we have surrendered and are obliged to surrender a great measure of that liberty which you and I have been asserting in court during all our lives; power over property, power over persons. This has to be vested in a military commander in order to carry on war successfully." Speech of Elihu Root at Saratoga Springs, Sept. 1917, quoted in Va. Law Rev., V, 179.

[19] "When the Constitution conferred upon Congress the right to declare war, it by necessary implication conferred upon Congress the right to do anything that in its judgment is necessary to carry that war to a successful conclusion." Senator P. C. Knox, in U. S. Senate May 29, 1917. Cong. Record, 65 Cong., 1 Sess., 3276.

"I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation." Letter of Lincoln to A. G. Hodges, Apr. 4, 1864. Nicolay & Hay, Complete Works of Abraham Lincoln, II, 508.

"If the Union and the Government cannot be saved out of

ecuted."[20] Even the dissenting justices in this case admitted that legislation founded upon the war power is subject to quite different considerations from that based upon the municipal power of the government, and "is subject to no limitations, except such as are imposed by the law of nations in the conduct of war . . . The war powers of the government have no express limitations in the Constitution, and the only limitation to which their exercise is subject is the law of nations."[21] The same principle has also been upheld by the Court in other cases.[22]

Though authorities thus seem to agree regarding the nature and unlimited extent of the "war powers" as such, the extent to which the exercise of these war powers is vested in the President or in Congress is a matter of some dispute. For example, Senator Browning, during the Civil War, asserted the complete authority of the Executive in determining upon the measures necessary to meet any war emergency, denying that Congress had even coordinate power with the President in that respect. "It is not true", he said, "that Congress may decide upon the measures demanded by military necessities and order them to be enforced. . . These necessities can be determined only by the military commander, and to him the Constitution has intrusted the prerogative of judging of them. When the Constitution made the President 'Commander-in-Chief of the Army and Navy of the United States', it clothed him with the incidental powers necessary to a full, faithful and sufficient per-

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this terrible shock of war constitutionally, a Union and a Government must be saved unconstitutionally." Fisher, Trial of the Constitution, 199.

[20] Miller v. U. S., 11 Wall., 268, 304-305, (1870).

[21] Ibid., 315.

[22] Stewart v. Kahn., 11 Wall., 493, 506-507, (1870); Mechanics and Traders Bank v. Union Bank, 22 Wall., 276, 295, (1874); McCormick et al., v. Humphrey, 27 Ind., 144, 154 (1866).

carried.[40] [illegible] the dissenting justices in this case [illegible] [illegible] "[illegible] the war power is [illegible] to quite different considerations than [illegible] the [illegible] power of the government, and is subject to [illegible] limitations, except [illegible] by the law of nations in its general theory . . . The war powers of the government have no express limitations in the Constitution, and the only limitations to which these powers [illegible] subject is the law of nations."[41] The same [illegible] has also [illegible] typical of the Court in other areas.[42]

Numerous restrictive [illegible] [illegible] [illegible] regarding the [illegible] and collateral effect of the "war powers" as such, the extent to which the exercise of these war powers is vested in the President [illegible] [illegible] of a [illegible] of [illegible] Congress. For example, Justice [illegible], during the Civil War, [illegible] the absolute authority of the [illegible] in determining when the [illegible] exists, to meet any war emergency, [illegible] that Congress [illegible] even [illegible] [illegible] with the [illegible] in this respect. "It is not [illegible]", he said, "that Congress [illegible] [illegible] [illegible] [illegible] [illegible] by military [illegible] [illegible] [illegible] in [illegible]. . . These [illegible] [illegible] [illegible] only to the military [illegible], [illegible] [illegible] [illegible] the [illegible] of [illegible] of them. [illegible] the Constitution [illegible] the President [illegible] of the army and navy of the United States", it [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible], [illegible] [illegible] [illegible]-

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[illegible] [illegible] of [illegible] [illegible], a [illegible] [illegible] [illegible] [illegible] [illegible]." [illegible], [illegible] of the [illegible], [illegible].

[41] [illegible] v. [illegible] U. S., 11 Wall., [illegible], [illegible] ([illegible]).

[42] Ibid., [illegible].

[43] [illegible] v. [illegible], [illegible] [illegible], [illegible], [illegible] ([illegible]); [illegible] [illegible] v. [illegible] [illegible], [illegible] [illegible] ([illegible]); [illegible] [illegible] v. [illegible], [illegible] [illegible], [illegible] ([illegible]).

formance of the duties of that high office; and to decide what are military necessities, and to devise and execute the requisite measures to meet them, is one of these incidents. It is not a legislative, but an executive function, and Congress has nothing to do with it."[23]

On the other hand, Senator Sumner disputed this claim to executive power, and held that the exercise of the war powers rested with Congress. "Of the pretension that all these enormous powers belong to the President, and not to Congress, I try to speak calmly and within bounds. I mean always to be parliamentary. But a pretension so irrational and unconstitutional; so absurd and tyrannical, is not entitled to respect. Such a pretension would change the National Government from a government of law to that of a military dictator . . ."[24]

As a matter of fact, the growth of executive power into a practical dictatorship in time of war, does not seem to have been especially feared in this country. During the Revolution, attempts were made, both in New York and Virginia, to create a dictator, who in the latter state was to be "invested with every power legislative, executive, and judiciary, civil and military, of life and death over our persons and over our properties",[25] a proposal apparently ap-

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[23] Speech in U. S. Senate, June 25, 1862. Cong. Globe, 37 Cong., 2 Sess., 2919, 2920, 2922.

[24] Speech in U. S. Senate, June 27, 1862. Works of Charles Sumner, VII, 139-140. But cf. Sumner's remarks in a speech at Boston, only a few months later (Oct. 6): "In war there is no constitutional limit to the activity of the executive, except the emergency. The safety of the people is the highest law. There is no blow the President can strike; there is nothing he can do against the Rebellion, that is not constitutional. Only inaction can be unconstitutional." Ibid., 217.

[25] Elliot's Debates, II, 357-361; Writings of Thomas Jefferson, III,231.

proved by such a democrat as Patrick Henry.[26] Washington was actually given the power of a dictator on three separate occasions;[27] while Lincoln has been referred to by impartial writers as exercising "more arbitrary power than any Englishman since Oliver Cromwell", and as one whose acts were "worthy of a Tudor."[28] During the recent world war, the necessity of making the President the supreme dictator in order to win the war was seriously suggested in Congress.[29]

That the President can of his own accord constitutionally assume dictatorial power in time of war has been denied by the courts as "an extravagant assumption";[30] although most authorities hold that the war powers of the President constitute a "latent power of discretionary action" capable of almost unlimited expansion in times of emergency and making the President practically absolute within a certain sphere of action.[31]

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[26] Elliot's Debates, III, 160; Writings of Thomas Jefferson, III, 231. They were, however, bitterly opposed by Jefferson.

[27] See resolves of Dec. 27, 1776, Sept. 17 & Nov. 14, 1777. Jour. Cont. Cong., VI, 1045-1046; VIII, 752; IX, 905. See also Elliot's Debates, III, 79.

[28] Rhodes, Historical Essays, 213; cf. Bryce, American Commonwealth, I, 65-66, 72; Ford, Rise and Growth of American Politics, 280.

[29] Senator Harding (Ohio) made the suggestion in August, 1917: "What the United States needs and what it must have if it is to win the war is a supreme dictator, with sole control of and sole responsibility for every phase of war activity, and this today means practically every phase of Government. Not only does this country need such a dictator, in my opinion it is sure to have one before the war goes much further. . .The sooner it comes the better for all of us . . . For supreme dictator at the present moment there is but one possible man, the President of the United States." N.Y.Times, Feb.10,1918.

[30] Jones v. Seward, 40 Barb. (N.Y.) 563, 571, (1863).

[31] Goodnow, Comparative Administrative Law, I, 32; Watson, On the Constitution, II, 914; Baldwin, Modern Political Institutions, 91-92; Channing, History of the United States, III, 513; W. A. Dunning, "The War Power of the President", New Republic, XI, 76-79 (May 19, 1917). For a somewhat extravagant claim as to the absolute nature of the President's war powers, see remarks of Senator Lewis, in U. S. Senate, June 30, 1917, Cong. Record, LV, Pt. 5 (65 Cong., 1 Sess.), 4552, 4553.

The exact limits of this sphere of action for the President and the line of demarcation between his war powers and those of Congress, are difficult to determine. An attempt to draw such a line and to delimit such a sphere of action was made in a famous case in the following language: "Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interfere with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions. The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxilliary powers. Each includes all authorities essential to its due exercise. But neither can the President in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law."[32] Other authorities have attempted a briefer and simpler delimitation by saying that "Congress regulates wahtever is of general and permanent importance, while the President determines all matters temporary and not general in their nature."[33]

The main source of the President's war powers is of course

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[32] Ex parte Milligan, 4 Wall., 2, 139 (1866).

[33] Fairlie, National Administration of the United States, 33; cf. Von Holst, Constitutional Law of the United States, 193.

the Constitution. Besides certain powers relating directly to war that are expressly conferred upon the President by that instrument,[34] other powers and duties are vested in him that may have an important bearing on the conduct of war;[35] while still other clauses of the Constitution not referring directly to the President may by necessary implication add to his war powers.[36] Other of the President's powers with regard to war are derived from international law and practice, are conferred by statute, or are established as a result of custom and usage. To define more clearly these war powers of the President, to determine their nature and source, and to discover the manner of their exercise, is the purpose of this study.

The most common forms through which the President in person exercises his powers, are by proclamations and executive orders, the former generally containing announcements and decisions of the widest interest and broadest scope, the latter usually concerning matters not of such general interest. Either may be issued as a result of express or implied statutory authorization, or by virtue of the President's constitutional position as Chief Executive. The great increase in the number of these proclamations and executive orders issued in war time is also an excellent indication of the growth of the war powers of the Executive over his power in time of peace.

Other forms of Presidential action include rules and regulations issued under statutory authority or by virtue of the

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[34] Art. II, Sec. 2, Cl. 1 (commander-in-chief).

[35] Art. I, Sec. 7, Cl. 2, 3 (sign and veto bills); Art. II, Sec. 1, Cl. 8 (oath of office); Sec. 2, Cl. 1 (power of pardon); Sec. 2, Cl. 2 (power with regard to foreign relations and appointment of officers); Sec. 3 (recommend measures, call special session, and execute the laws).

[36] Art. I, Sec. 9, Cl. 2 (habeas corpus); Art. IV, Sec. 4, (guaranty of republican government and of protection).

President's constitutional power; directions, instructions, or orders to heads of departments and other agencies; and decisions on matters requiring his approval or coming to him through appeals from the decisions of subordinate officials. Finally, the commissioning of officers appointed by him with or without the consent of the Senate, the recommendation of measures to Congress, and the signing or vetoing of bills, may be included among the means through which the President exercises his authority, and which must be considered in connection with this study of his powers.[37]

Not all of the acts required of the President can possibly be performed by him personally, and the courts have definitely recognized that he may act through the heads of departments. "The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties", and the acts of the heads of departments are "in legal contemplation the act of the President".[38]

It has also been held that heads of departments may in turn act through subordinate officials in the departments;[39] but the question as to how far this delegation of power may be carried and still be considered the act of the President seems as yet to be unsettled by the courts. It has been pointed out that most orders and regulations are in fact prepared by subordinate officials in the several departments, although issued in the name of the head of the department or in the name of the President; and also that in some cases, and especially during the recent war, such orders and regulations have been issued by subordinate officials, acting by

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[37] Cf. Fairlie, National Administration of the U. S., 41-42.

[38] Wilcox v. Jackson, 13 Pet., 498, 513 (1839); U. S. v. Eliason, 16 Pet., 291 (1842).

[39] U. S. v. Warfield, 170 Fed., 43 (1909).

authority of the head of the department, in matters where the statutes vested the power in the President.[40] This practice, undoubtedly becoming more common, opens up a vast new field for a study of the exercise of Presidential powers. Since, however, as has been suggested, it is still an open question how far such exercise of authority by subordinate officials can be considered as the act of the President, this study makes no attempt to include any exercise of power but by the President himself, or for which he may clearly be immediately responsible.

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[40] J. A. Fairlie, in Mich. Law Rev., XVIII, 188 (Jan., 1920).

I. POWERS RELATING TO THE BEGINNING OF WAR.

Chapter II.

Control of Foreign Relations.

The function of managing the foreign relations may be classified into two distinct branches: (1) the power of intercourse, intercommunication, and negotiation; (2) the power of entering into formal or binding international compacts.[1] The latter power is shared by the President with the Senate,[2] but the former belongs exclusively to the President. "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[3]

Although diplomatic negotiations and intercourse are regularly conducted through the Department of State, the acts of that department are in legal contemplation the acts of the President,[4] and, in fact, the Department of State has generally been recognized as having a special status, as being more directly subject to the control of the President than any other department. This was clearly set forth by Senator John C. Spooner in a speech before the United States Senate on January 23, 1906, when he said: "The act creating the Department of State in 1789, was an exception to the acts creating the other Departments of the Government. . . . It is a Department which from the beginning the Senate has never assumed the right to direct or control, except as to clearly defined matters relating to duty imposed by statute and not connected

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[1] Pomeroy, Constitutional Law (Bennett's ed.), 564; Fairlie, National Administration of the United States, 29-30.

[2] Constitution, Art. II, Sec. 2, Cl. 2.

[3] John Marshall, in House of Representatives, Mar. 7, 1800. Annals of Cong. 6 Cong., 613; cf. Pomeroy, op. cit., 564; Corwin, The President's Control of Foreign Relations, 33.

[4] Jones v. U. S. 137 U. S. 202, 217 (1890); Crandall, Treaties: Their Making and Enforcement (2nd ed.), 93.

with the conduct of our foreign relations. We direct all the other heads of Departments to transmit to the Senate designated papers or information. We do not address directions to the Secretary of State. We direct requests to the real head of that Department, the President of the United States, and, as a matter of courtesy, we add the qualifying words, 'if in his judgment not incompatible with the public interest'."[5]

This control which the President exercises over our foreign relations has, with regard to his war power, several principal phases. In the first place, it gives the President the whole power of initiating and formulating the foreign policy of the government, and virtually of committing the nation to its execution. Jefferson expressed this idea in a letter to M. Genet, November 22, 1793: "He (the President) being the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation; and whatever he communicates as such, they have the right, and are bound to consider as the expression of the nation."[6] Ex-President Taft, referring to the President's power of conducting the diplomatic correspondence, expressed the same thought in the following words: "He is bound in such correspondence to discuss the proper construction of treaties. He must formulate the foreign policies of our government. He must state our attitude upon questions constantly arising. While strictly he may not bind our government as a treaty would bind it, to a definition of its rights, still in future discussions foreign Secretaries of other countries

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[5] Cong. Record, 59 Cong., 1 Sess., 1420; cf. Ogg & Beard, National Governments and the World War, 97.

[6] Am. State Papers, For. Rel., I, 184.

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are wont to look for support of their contentions to the declarations and admissions of our Secretaries of State in other controversies as in a sense binding upon us. *There is thus much practical framing of our foreign policies in the executive conduct of our* foreign relations."[7] President Wilson has put the case for the President even more strongly: "One of the greatest of the President's powers (is) . . . his control, *which is very absolute*, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses *without any restriction whatever*, is virtually the power to control them absolutely. The President cannot conclude a treaty with a foreign power without the consent of the Senate, but he may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and *when in any critical matter it is completed the government is virtually committed*. Whatever its disinclination, the Senate may feel itself committed also."[8]

This power of the President has also been definitely upheld by the Supreme Court,[9] and there can thus be no question as to his right and power under ordinary circumstances to initiate and formulate such diplomatic policies as he may deem proper, and virtually commit Congress and the country to their execution. It is also freely conceded by authorities that the Executive Department, by means of this branch of its power over foreign relations, "holds

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[7] *Our Chief Magistrate and His Powers*, 113.

[8] *Constitutional Government*, 77-78; See also President Wilson's letter to Senator Fall, Dec. 8, 1919, *Infra.*, .29; S. E. Baldwin, in *Yale Rev.*, IX, 407.

[9] *Foster v. Neilson*, 2 Pet., 253, 309 (1829); *Williams v. Suffolk Ins. Co.*, 13 Pet., 415, 420 (1839).

in its keeping the safety, welfare, and even permanence of our internal and domestic institutions."[10] This fact, that policies leading to disturbed relations with other powers and even endangering the peace and safety of the country may be, and in fact have been, adopted at the will of the Executive, has led to considerable discussion as to the propriety of entrusting the sole responsibility for these matters to the President. The question has been raised whether, in view of the power of Congress to declare war, the President is under a constitutional obligation not to formulate and prosecute such diplomatic policies as might incur the risk of war, or whether, in case grave consequences are feared, he should not at least advise and consult with Congress.

The idea that the President is under some such obligation has been brought forward on several occasions. It was raised in 1826, when the proposal of President Adams to send representatives to the Panama Congress[11] aroused the opposition of such senators as Hayne, Woodbury, White, Van Buren, and Benton, largely on the ground that this Congress was to be really a congress of belligerents, and that the United States, by taking part, would compromise its neutrality, become involved in "entangling alliances", and incur the risk of war with Spain.[12] Their sentiments were expressed by Van Buren (later President), when he said: "It is, then, the design of the Executive to enter into an agreement at the Congress . . . that if the powers of Europe make common cause with Spain, or otherwise attempt the subjugation of Spanish America, we shall unite with the latter, and contribute our proportion to the means necessary to

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[10] Pomeroy, op. cit., 565.

[11] Richardson, Messages and Papers of the Presidents, II, 318-320.

[12] Benton's Debates, VIII, 423,425,435,436,441,446,450,462.

make the resistance effectual; and further, that we shall bind ourselves, at that Congress, as to the manner in which we shall resist any attempts, by the European powers, to colonize any portion of this continent". Such a proposal he characterized as "a measure by which the peace of the country is to be exposed to a contingency beyond the control of our Government -- by which the great question of peace or war will be taken from the Representatives of the people -- by which, instead of retaining that freedom of action which we now possess, we shall bind ourselves, in a certain event, to pursue a certain course, whatever those, to whom the Government of the country may have been committed, shall think the honor or interest of the country may require."[13]

In the House of Representatives there was likewise considerable opposition to the President's proposal on the same grounds. Thus Mr. Rives spoke of the result of our participation in the Congress as "most probably the adoption of measures endangering the future peace of the country", and of the President's declaration with regard to foreign interference in the affairs of South America as "a conditional, or, to use a more diplomatic phraseology, a provisional declaration of war;"[14] while Mr. Hamilton remarked, "We have become, at the execlusive will of the President, the arbitrator of the New World, and, in that character, have sent bullying protests to the old. The Cabinet has, in our name, made two solemn contracts, to go to war in two contingencies, without, 'as a matter of preliminary advisement', even condescending to consult us."[15] Others spoke to the same effect, and an attempt was even made to in-

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[13] Benton's Debates, VIII, 446-447.
[14] Ibid., IX, 107, 111.
[15] Ibid., 136.

struct the envoys to the Congress by attaching conditions to the resolution providing for the mission.[16]

These conditions were vigorously opposed in the House by Webster and others as an invasion of the power of the President to instruct ministers,[17] and were eventually beaten.[18] There was, however, considerable sentiment to the effect that while there was no power in the House to issue instructions either to the President or to ministers, still the House, through its power of granting or refusing appropriations, might exercise a restraint upon foreign diplomatic intercourse -- a power which should, however, be exercised only when the policy of the Executive was clearly tending to involve the country in war.[19] Senator Johnston (of Louisiana) probably best summed up the position of the President and his supporters when he said: "There is nothing peculiar in the present case. The President has, at all times, the power to commit the peace of the country, and involve us in hostilities, as far as he has power in this case. To him is confided all intercourse with foreign nations. To his discretion and responsibility is intrusted all our delicate and difficult relations: all negotiations and all treaties are conducted and brought to issue by him."[20] Even Van Buren, who had spoken against the mission, admitted that, no matter what action the Senate or Congress might take, the President could still constitutionally provide for such mission on his own autho-

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[16] Benton's *Debates*, IX, 91.
[17] *Ibid.*, 94-95, 101, 115, 150.
[18] *Ibid.*, 217, 218.
[19] See, for example, remarks of Mr. Thompson, *Ibid.*, 182.
[20] *Ibid.*, VIII, 439.

rity.[21]

Whether or not the Panama mission of 1836 actually carried with it the dangers attributed to it by its opponents may still be a matter of some dispute, but is of little consequence to this study. The important point to be noted, on which both advocates and opponents of the mission were agreed, is that, if it was within the power of the President alone to decide upon a certain diplomatic policy, such as this mission, it was likewise within his power, and his alone, to determine whether or not its consequences might involve the peace and safety of the country. The President having made his decision and carried out his policy, Congress and the country would be committed to it, regardless of consequences.

This power of the President has been demonstrated in actual practice again and again. During a period of about twenty-five years (1823-1849), the Cuban policy of the Executive was consistently friendly to Spain and a guaranty of Spanish sovereignty; after the Mexican War that was changed to a policy whose chief end was the acquisition of Cuba by the United States, and in the development of which American diplomacy has been characterized as "agressive and intolerant"; while during the period after the Civil War, it was again changed to a policy of commercial and humanitarian interest, culminating finally in actual intervention and

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[21] Benton's Debates, VIII, 441. "But though neither Congress nor the courts may direct the President in the discharge of his constitutional powers, yet either the Senate or the House separately, or both concurrently, may pass resolutions expressive of their desires in relation to questions of an international character, and the President may give such resolutions any weight he chooses, notwithstanding that they have no legal effect. Indeed, it is a part of the President's discretion to pay heed to such resolutions or not, as he elects." Corwin, The President's Control of Foreign Relations, 40.

war.[22]

President Grant's handling of the Virginius incident in 1873, President Cleveland's of the Venezuelan affair of 1897, and President Wilson's of the Mexican situation throughout the entire course of his administration, illustrate the power of the President both to bring on and to avert diplomatic crises.[23] Mention need only be made of such events as Washington's neutrality policy, the Monroe Doctrine, the annexation of Texas, the Mexican War, the Alabama Claims settlement, the acquisition of the Panama Canal, the Big Stick doctrine, our entrance into the war with Germany -- "all these, and many more," says Corwin, "must be set down to the credit of executive leadership in the field of foreign relations."[24]

It may therefore be asserted that the President, through his control of diplomatic intercourse, holds in his keeping the peace and safety of the United States, that he may initiate such diplomatic policies and so conduct diplomatic negotiations as to force the country into a war, "without any possibility of hindrance from Congress or the Senate".[25]

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[22] Benton, International Law and Diplomacy of the Spanish-American War, 14-20; Rhodes, History of the United States, II, 350-354. See message of President Cleveland to Congress, Dec. 7, 1896; and President McKinley's statement of the grounds for intervention, in his message of Apr. 11, 1898, Richardson, op. cit., IX, 719-721; X, 147.

[23] Rhodes, op. cit., VII, 29-36; Chadwick, Relations of the United States and Spain: Diplomacy, 314-357. "In an hour, by this executive act (Cleveland's action in the Venezuelan affair), we are brought face to face with a question of war with the leading power in Europe, and the danger of it passes away through a diplomatic correspondence, for the issue of which the President was again alone responsible. The very ground of our interference in this quarrel of Venezuela -- what was it but a doctrine proclaimed, and indeed invented, by a President of the United States? The Monroe Doctrine has laid down the law for our hemisphere, and it was the single act of the executive department." Baldwin, Modern Political Institutions, 105-106.

[24] The President's Control of Foreign Relations, 126; cf. Ford, Rise and Growth of American Politics, 279, 280.

[25] Fairlie, Nat. Administration, 30; Pomeroy, Constititional Law, 565.

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A second phase of the President's control of foreign relations that should be considered in this connection is his power to *recognize the belligerency or independence of new states and governments*. This power of recognition is not expressly granted by the Constitution, but is implied from the general power to enter into diplomatic relations with foreign countries through the making of treaties and the exchange of accredited envoys.[26] It is not conferred in terms upon any one department of the government, but is now generally conceded as belonging to the Executive.[27] In

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[26] *Constitution*, Art. II, Sec. 2, Cl. 2; Sec. 3; cf. Taft, *Our Chief Magistrate and His Powers*, 112-113; Story, *Commentaries on the Constitution*, II, 370-371.

[27] In several cases the courts have declared the power of recognition to be vested in the "political department" of the government, without indicating clearly whether the executive or legislative department, or both, was meant. *Rose v. Himely*, 4 Cr., 241 (1801); *Gelston v. Hoyt*, 3 Wheat., 246, 324, (1818); *Foster v. Neilson*, 2 Pet., 253, 307 (1829); *Jones v. U. S.*, 137, U. S., 202, 212 (1890). However, in other cases, both the language and tone of the decisions are such as to show that the executive department is meant. *U. S. v. Hutchings*, 2 Wheeler's Criminal Cases, 543, cited in Sen. Doc. No. 56, 54 Cong., 2 Sess., 24; *Williams v. Suffolk Ins. Co.*, 13 Pet., 415, 420 (1839); *Kennett v. Chambers*, 14 How., 38, 46, 50-51 (1852); *U. S. v. Trumbull*, 48 Fed., 99, 104 (1891); *The Stata*, 56 Fed., 505, 510 (1893).

See also *Senate Document No. 56*, 54 Cong., 2 Sess., containing a report of the Senate Committee on Foreign Relations, presented to the Senate Jan. 11, 1897, in which, after an exhaustive investigation into the whole subject of recognition, it was held that the power of recognition rested properly with the President. In 1864, the Mexican situation brought about the passage of a House resolution declaring that "Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well in the recognition of foreign powers as in other matters"; and in 1896, a concurrent resolution was passed recognizing a state of war in Cuba and offering the good offices of the United States for the recognition of Cuban independence. These resolutions were ignored by Presidents Lincoln and Cleveland, respectively, on the ground that recognition was a matter for the Executive alone. *Cong. Globe*, XXXV, Pt. I, 65, 67; Latané, *America as a World Power*, 9.

The joint resolution of 1898 authorizing intervention in Cuba, declared "That the people of the island of Cuba are, and of right ought to be, free and independent"; but authorities hold that this is a mere statement of policy and not to be regarded as a claim by Congress to the power of recognition." Benton, *International Law and Diplomacy of the Spanish-American War*, 99; Corwin, *The Presi-*

practice, recognition has always been extended as the exclusive act of the President.[28]

New states generally come into existence by breaking off from an actually existing state, and although recognition even in such cases is "a normal act, quite compatible with the maintenance of peaceful intercourse with the mother-country", provided the new community has actually won its contest and successfully maintained its independence and separate existence,[29] authorities agree that premature recognition is a wrong done to the parent state, that it amounts to an act of intervention, and may properly be considered by the parent state as a cause for war.[30] Through the exercise of this power the President is thus upon occasion enabled to determine the question of peace or war for the United States.

The serious responsibility thus resting upon the President has been recognized on several occasions. When the South American provinces were clamoring for recognition in 1817, President Monroe, although sympathetic with their aspirations, evidently feared possible complications with Spain,[31] and in spite of pressure from

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dent's Control of Foreign Relations, 80-81.

Senator King (Utah) proposed a Senate resolution, May 23, 1919, for the recognition of the Omsk government of Russia, which seems to have been buried in committee, Cong. Record, 66 Cong., 1 Sess., (May 23, 1919), 154.

[28] For the manner in which recognition has been extended to other countries by the United States, see Senate Document No. 40, 54 Cong., 2 Sess.

[29] Lawrence, Principles of International Law (6th ed.), 88.

[30] Ibid.; Hall, International Law (6th ed.), 83; Moore's Digest of International Law, I, 73.

[31] See memorandum of questions submitted to his Cabinet, Oct. 25, 1817. Writings of James Monroe, VI, 31.

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Clay and his following in Congress,[32] declined to recognize these new states until he was satisfied that Spain would not resent the act with war.[33]

President Jackson, curiously enough, was likewise extremely cautious about arousing the hostility of Mexico through a premature recognition of Texas, declined to receive the Texan commissioners sent to Washington in March, 1836, to ask for recognition,[34] and apparently was unwilling to take the sole responsibility in cases involving possible international complications. Referring to the Texas situation in his message of December 21, 1836, he spoke of the acknowledgment of a new state as independent as "at all times an act of great delicacy and responsibility, but more especially so when such state has forcibly separated from another of which it had formed an intergral part and which still claims dominion over it. A premature recognition under these circumstances, if not looked upon as a justifiable cause of war, is always liable to be regarded as proof of an unfriendly spirit to one of the contending parties." He therefore announced that he considered it "with the spirit ofthe Constitution, and most safe", that the power of recog-

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[32] Clay in 1817 mounted what John Quincy Adams called "his South American great horse", and by means of resolutions proposed by himself and his followers, kept the question of recognition of these provinces constantly before Congress from 1818 to 1822, in an effort to force the hand of the President. Memoirs of John Quincy Adams, IV, 28; Annals of Cong., 15 Cong., 1 Sess., II, 1468, 1569, 1646, 1652, 1655; ibid., 16 Cong., 1 Sess., II, 2223, 2229-2230; 2 Sess., 1071, 1077, 1081, 1091-1092; ibid., 17 Cong., 1 Sess., I, 854, 982.

[33] "The delay which has been observed in making a decision on this important subject will, it is presumed, have afforded an unequivocal proof to Spain, as it must have done to other powers, of the high respect entertained by the United States for her rights and of their determination not to interfere with them. . . It may be presumed that the successful progress of the revolution through such a long series of years . . . will reconcile the parent country to an accommodation with them on the basis of their unqualified independence." Message to Congress, Mar. 8, 1822. Richardson, op. cit., II, 116-118.

[34] Reeves, American Diplomacy under Tyler and Polk, 78.

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nition, when probably leading to war, should be exercised"with a previous understanding with that body by whom alone war can be declared, and by whom all provisions for sustaining its perils must be furnished."[35]

The Senate Committee on Foreign Relations, in its report of January 11, 1897, already mentioned,[36] although strongly upholding the President's right to the power of recognition, emphasized also the dangers involved in the exercise of that power, since the older nation might regard such recognition as a cause of war. The question whether a nation should recognize another, and thus risk going to war with a third, was stated to be largely a question of expediency, of which the Executive was the best qualified to judge, though it was added that "if recognition of such independence is liable to become a casus belli with some foreign power, . . . it is most advisable as well as proper for the executive first to consult the legislative branch as to its wishes and postpone its own action if not assured of legislative approval. If, on the other hand, the Executive did not consider that the time had arrived to act, expressions of opinion by the legislature should be made with some caution."

It seems therefore to be the general consensus of opinion that, while the power of recognition belongs properly to the President, it is a power that may easily involve serious complications with foreign nations, and in such cases should be exercised with due regard for the wishes of that branch of the government whose function it is to declare war. It should be noted, however, that any action of Congress would be merely advisory, that the whole power rests with the President alone. "It is the proper province

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[35] Richardson, op. cit., III, 266-267.
[36] Senate Document No. 56, 54 Cong., 2 Sess., 2.

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The Senate Committee on [illegible] of January 11, 1927, [illegible].23 [illegible]

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22. [illegible], op. cit., [illegible].
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of the Executive to refuse to be guided by a resolution on the part of the legislature, if, in his judgment, to do so would be unwise. The legislature may express its wishes or opinions, but may not command."[37]

From his power to receive and send accredited envoys, the President also derives the power to withdraw the diplomatic representatives of the United States at his pleasure, or dismiss those of foreign powers, and thus sever all relations with any particular country -- a power which a distinguished authority has said "may be so exercised as to produce most momentous results."[38]

This power to sever diplomatic relations is a power that has always been considered as peculiarly within the province of the President, and until very recently no attempt was ever made by Congress to assert any authority in that respect. However, the unsettled condition of affairs in Mexico, and the opinion of some people that President Wilson was being too patient in his handling of Mexican affairs, led to the introduction by Senator Fall (New Mexico), on December 3, 1919, of a concurrent resolution requesting the

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[37] Willoughby, On the Constitution. I, 462; cf. Corwin, op. cit., 82. "It is not, indeed, a power likely to be abused, though it is pregnant with consequences often involving the question of peace or war. And, in our own short experience, the revolutions in France, and the revolutions in South America, have already placed us in situations to feel its critical character, and the necessity of having at the head of the government an executive of sober judgment, enlightened views, and firm and exalted patriotism." Story, Commentaries, II, 371.

[38] Burgess, Political Science and Comparative Constitutional Law, II, 251. Hamilton did not seem to appreciate the tremendous possibilities in the exercise of this power, especially to receive ministers, for he passed it by with this brief comment: "This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government." The Federalist, No. 68 (Goldwin Smith ed., pp. 383-384.)

President to withdraw recognition from the Carranza Government and "to sever all diplomatic relations now existing between this Government and the pretended Government of Carranza".[39]

Though this resolution clearly went beyond the traditional view that the President alone has the entire responsibility for deciding whether or not diplomatic relations should at any time be severed, there seemed to be a disposition on the part of the Foreign Relations committee of the Senate to recommend it favorably and push it to a vote. President Wilson, however, in a letter of December 8, 1919, to Senator Fall, vigorously asserted the power and responsibility of the Executive in this matter, expressing himself as follows: "I should be gravely concerned to see any such resolution pass the Congress. It would constitute a reversal of our constitutional practice, which might lead to very great confusion in regard to the guidance of our foreign affairs. I am convinced that I am supported by every competent constitutional authority in the statement that the initiative in directing the relations of our Government with foreign Governments is assigned by the Constitution to the Executive, and to the Executive only. Only one of the Houses of Congress is associated with the President by the Constitution in an advisory capacity, and the advice of the Senate is provided for only when sought by the Executive in regard to explicit agreements with foreign Governments and the appointment of diplomatic representatives who are to speak for this Government at foreign capitals. The only safe course, I am confident, is to adhere to the prescribed method of the Constitution. We might go very far afield if we departed from it."[40]

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[39] See text of resolution in N. Y. Times, Dec. 4, 1919.
[40] N. Y. Times, Dec. 9, 1919.

Upon receipt of this letter, Senator Lodge, chairman of the Senate Committee on Foreign Relations, immediately announced that the committee would not push the Fall resolution, but would leave the entire responsibility for the Mexican situation with the President, thus virtually acknowledging the soundness of the President's position.[41]

The breaking of diplomatic relations, while not in itself an act of war, and not necessarily resulting in war, is meant to be a marked affront and generally does lead to war.[42] President Wilson thus understood very well, as did the whole country, that his action, on February 3, 1917, in dismissing the German ambassador to the United States and recalling Ambassador Gerard from Berlin, was very likely the first step towards actual war, although in his address to Congress on that date he expressed himself as hopeful that further complications might be avoided.[43]

Finally, the President may to a considerable extent determine questions relating to the peace of the United States through his power to enter into so-called executive agreements with other

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[41] "Of course the committee will do nothing now. The President desires complete responsibility for the Mexican situation to rest on him. Let it rest there. We desired only to assist him; he does not wish us to do so. He does not even allow us to express our support or make a suggestion. The committee will not again consider the resolution. We are through." Statement of Senator Lodge. N. Y. Times, Dec. 9, 1919.

[42] See T. S. Woolsey, "The Beginning of War", Proc. Am. Pol. Sci. Assn., I, 54-68, esp. 57-60.

Diplomatic relations with Brazil were severed in 1827 and with Mexico in 1858, but in each case were very shortly restored without any intervening complications; with Mexico they were broken off also in 1836, and continued broken for three years, without war; relations between Turkey and the United States were severed Apr. 20, 1917, but war was never declared between the two countries. Reeves, American Diplomacy under Tyler and Polk, 76; Moore's Digest, VII, 103-105; N. Y. Times Current Hist. Mag., VI, 437.

[43] See text of address in McKinley, Collected Materials for the Study of the War, (1st ed.), 11-12.

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[41] [illegible] N. Y. Times, [illegible] 1917.

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powers. The Constitution requires that treaties can only be made by the President by and with the advice and consent of the Senate,[44] but "treaties" by no means include every sort of international arrangement entered into. Agreements of various sorts, some concerning only minor and routine matters, others on matters of considerable importance and delicacy, are frequently made by the President without the knowledge or consent of the Senate, and are by long practice considered to be within the range of his authority.[45] Such agreements, although not a part of the "supreme law of the land", as are treaties, nevertheless are considered binding upon the administration making them, but not upon succeeding administrations.[46] As a matter of fact, most of these agreements covering matters of any considerable importance have been respected by the successors of those making them, and have by general consent come have the effect of a settled law.

Such executive agreements take the various forms of a protocol, a modus vivendi, an exchange of notes or memoranda, or a mere "gentlemen's agreement", and are entered into by the President by virtue of his powers as Commander-in-Chief or of his diplomatic powers.[47] As an example of executive agreements based upon the first class of powers may be mentioned the agreement of 1817 with Great Britain for the limitation of naval armaments on the Great Lakes.

This agreement was brought about by an exchange of notes between the British minister at Washington (Mr. Bagot) and the

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[44] Art. II, Sec. 2, Cl. 2.

[45] J. B. Moore, in Pol. Sci. Quar., XX, 388-390; Ogg & Beard, National Governments and the World War, 102.

[46] Butler, The Treaty-Making Power of the United States, II, 370; Angarica v. Bayard, 127 U. S., 251, 261 (1888).

[47] Corwin, The President's Control of Foreign Relations, 116.

Acting Secretary of State (Mr. Rush), and provided that neither party should keep in service on Lakes Champlain and Ontario more than one, and on Lake Erie and the upper lakes more than two armed vessels, none of these to be armed with more than one cannon, and all other armed vessels of both parties to be dismantled.[48] Although President Monroe nearly a year later submitted the arrangement to the Senate for its approval,[49] this action was merely perfunctory, since the agreement had become effective immediately after the date of the original exchange of notes (April 28-29, 1817), through orders issued by the Secretary of the Navy to the naval officers commanding on the Great Lakes.[50] The arrangement was definitely undertaken as a measure to preserve the peace between the two countries,[51] and remains to this day as a striking example of what may be done twoards that end by purely Executive action.

Another agreement between these two countries of somewhat similar import with respect to armament was entered into by

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[48] Am. State Papers, For. Rel., IV, 205-206.

[49] Message to the Senate, Apr. 6, 1818, Ibid., 202. John Quincy Adams says on Jan. 14, 1818, that the President did not think it necessary to communicate the arrangement to Congress. Memoirs, IV, 41. The Senate gave its approval Apr. 16, 1818, following which the President issued a formal proclamation April 28, announcing that the agreement was in effect. Am. State Papers, For. Rel., IV, 207.

[50] The terms of the agreement were communicated by Mr. Rush to Secretary of the Navy Crowninshield on Apr. 30, 1817, and the necessary orders were issued by the latter May 2. Ibid., 206-207.

[51] "The President (Madison), being satisfied that, if each nation should maintain on the lakes a naval force, it would expose both to considerable and useless expense, while it would multiply the risks of collision between them, instructed Mr. Adams, shortly after the peace, to make the proposals . . . in the hope that it might be carried into immediate effect." Monroe to Bagot, Aug. 2, 1816, Ibid., 203. "This arrangement for mutual disarmament on the lakes has undoubtedly been the greatest single factor in the continuance of peaceful relations between the United States and Great Britain during the last one hundred years." Updyke, Diplomacy of the War of 1812, 465-466.

means of a protocol signed at London, December 9, 1850, by the United States minister (Abbott Lawrence) and Lord Palmerston, under which the British government ceded Horseshoe Reef in Lake Erie to the United States, the latter agreeing to erect a light-house but to maintain no fortifications. The agreement was ratified by an exchange of notes in London, February 10, 1851, with no formal ratification on the part of either country, and the light- house was erected in 1856 upon appropriation of the necessary funds by Congress.[52]

In 1859 a dispute between the United States and Great Britain over the island of San Juan off the Pacific coast, which threatened to cause serious difficulty between the two countries, was settled by an agreement, reached through an exchange of notes, for joint military occupation of the island.[53] This arrangement, which continued until the entire island was given over to the United States under an arbitral decision in 1873, was upheld by the courts as a proper exercise of Executive authority, even to the extent of modifying, in the interest of peace, existing statutes for the government of the disputed territory.[54]

Perhaps the most remarkable exercise of the President's power to make international agreements without the consent of the Senate, by virtue of his authority as Commander-in-Chief, is the

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[52] J. B. Moore, in Pol. Sci. Quar., XX, 390.

[53] Crandall, Treaties: Their Making and Enforcement, 106; Foster, Practice of Diplomacy, 321.

[54] "The power to make and enforce such a temporary convention respecting its own territory is a necessary incident to every national government, and adheres where the executive power is vested. . . This particular convention should be allowed to modify for the time being the operation of the organic act of this Territory, so far forth as to exclude to the extent demanded by the political branch of the government of the United States, in the interest of peace, all territorial interference in the government of that island." Watts v.U.S., 1 Wash. Terr.,288,294 (1870),quoted in Crandall,op.cit., 106-107.

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protocol concluded September 7, 1901, between China and the Allied Powers that had intervened during the Boxer uprising. This protocol required reparation for the murder of the German minister, and punishment of the principal authors of the outrages committed against foreigners during the uprising; prohibited to China the importation of arms and ammunition or of materials used exclusively for their manufacture; demanded an indemnity of 450,000,000 taels; constituted an extraterritorial quarter for the foreign legations in Peking; permitted temporary occupation by the Powers of certain strategic points; and required numerous undertakings on the part of China, especially with regard to the conduct of her foreign relations.[55]

This protocol was signed on the part of the United States by W. W. Rockhill, whose appointment as special commissioner to China had not been submitted to the Senate; it went into effect without any further ratification, the whole matter thus being carried on and concluded by authority of the Executive alone.

It is now authoritatively recognized that the President, without legislative authority, but solely by virtue of his powers as Commander-in-Chief, may permit or refuse the entry of foreign troops into the United States.[56] By virtue of the same authority, arrangements were made with Mexico in 1882, through an exchange of

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[55] See text of protocol in For. Rel. 1901, App., 312-318. Foster calls this "probably the broadest exercise of executive authority in foreign matters without the concurrence of the Senate." Practice of Diplomacy, 318.

[56] Tucker v. Alexandroff, 183 U. S., 424, 435 (1902). Cf. Washington's refusal to permit British troops to cross United States territory in 1790, and the opinions of his Cabinet on the question. Writings of George Washington, XI, 497, n.; Writings of Thomas Jefferson, V, 238-239; Works of Alexander Hamilton, IV, 20-49; Life and Works of John Adams, VIII, 497-500.

notes, for the reciprocal passage of troops across the border in pursuit of hostile Indians. It is worthy of note that the Mexican Executive was distinctly authorized by the Mexican Senate to permit such crossing of troops, while in the United States the terms of the agreement were referred, not to the Senate, but to the General of the Army, and approved by him and the Secretary of War.[57] These arrangements were renewed at various times,[58] and form the basis for the attempted agreements of like nature during the border troubles in 1916.[59] A similar arrangement with Great Britain for the reciprocal crossing of the Canadian boundary was proposed by Secretary Frelinghuysen in 1883, but was rejected by Canada on the ground that it involved the "risk of complications worse than that of Indian raids."[60]

Among executive agreements entered into by virtue of the President's diplomatic powers, and dealing with matters causing considerable dispute, difficulty, and possible complications, may be mentioned an agreement of 1885 with Great Britain, reached by an exchange of memoranda, with regard to the fisheries question;[61] a

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[57] For. Rel. 1882, 396-397, 405, 419-426. The memorandum signed by Secretary Frelinghuysen and Minister Romero stated that since the Mexican Senate had authorized the President of Mexico to allow the passing of Mexican troops into the United States and of United States troops into Mexico, "and the Constitution of the United States empowers the President of the United States to allow the passage without the consent of the Senate, this agreement does not require the sanction of the Senate of either country, and will begin to take effect twenty days after this date (July 29, 1882)."

[58] June 28,1883; Oct.31,1884; Oct.16,1885; June 25,1890; Nov. 25, 1892; June 4, 1896.

[59] N. Y. Times Current Hist. Mag., IV,403,616,618-619,627.

[60] See report of the Indian Commissioner for the Northwest Territories (Canada). For. Rel. 1883, 528.

[61] For.Rel.1885, 460-469. "This agreement proceeds from the mutual good-will of the two governments, and has been reached solely to avoid all misunderstandings and difficulties which might otherwise arise from the abrupt termination of the fishing of 1885 in the midst of the season." Statement of Secretary Bayard. Ibid., 460.

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modus vivendi with the same country in 1899 fixing a provisional boundary between Alaska and Canada;[62] the protocol of 1873 settling the Virginius affair with Spain;[63] Secretary of War Taft's adjustment of the boundaries of the Panama Canal Zone;[64] and the Root-Takahira and Lansing-Ishii agreements of 1907 and 1917, respectively.[65]

The action of President Roosevelt in 1905 with regard to Santo Domingo is especially noteworthy in this connection, in that a treaty was first negotiated providing that the United States should guarantee the integrity of that country, take charge of its customs, and settle its obligations; and when this treaty failed of ratification in the Senate, President Roosevelt nevertheless put its terms into effect through a modus vivendi. For two years the affairs of that island were administered under the sole authority of this executive agreement, until in 1907 the Senate yielded and ratified a slightly revised treaty.[66]

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[62] For. Rel. 1899, 328-330.

[63] Crandall, op. cit., 107-108.

[64] "I had no power to make a treaty with Panama, but I did have, with the authority of the President, the right to make rules equivalent to law in the Zone. I therefore issued an order directing the carrying out of the plan agreed upon, in so far as it was necessary to carry it out on our side of the line, on condition that, and as long as, the regulations to be made by Panama were enforced by that government. This was approved by Secretary Hay and the President, and has constituted down until the present day, I believe, the basis upon which the two governments are carried on in this close proximity. It was attacked vigorously in the Senate as a usurpation of the treaty-making power, and I was summoned before a committee in the Senate to justify what had been done. There was a great deal of eloquence over this usurpation by Mr. Morgan and other Senators, but the modus vivendi continued as the practical agreement between the nations for certainly more than seven years, and my impression is that it is still in force in most of its provisions." Taft, Our Chief Magistrate and his Powers, 111-112.

[65] For. Rel. 1908, 510-512; Am. Jour. Int. Law, XII, Supp.1-3.

[66] Latané, America as a World Power, 280-281; J. B. Moore, in Pol. Sci. Quar., XX, 386-387; Roosevelt, Autobiography, 551-552.

The President is thus enabled, through his power of entering into these executive agreements which do not require the sanction of the Senate, to assume complete responsibility for the handling of matters of almost every variety in the field of foreign relations, many of which involve complications and delicate questions that might easily affect the peace and safety of the United States.

Chapter III.

Military Measures Short of War.

By virtue of his position as Commander-in-Chief, as well as by authority of other constitutional and statutory provisions, the President may undertake numerous military measures that are short of actual war. In the first place, there are many instances in which he may employ the armed forces to aid the civil authorities within the United States. Thus, for example, the constitutional clause guaranteeing to every state a republican form of government and protection against domestic violence,[1] is held to give the President power to use troops, without special legislative sanction, when needed for those purposes, and even to anticipate and prevent local disturbances by a show of force.[2]

In 1878 an attempt was made to restrict the President's power to use the armed forces in executing the laws of the United States through an act of Congress forbidding the employment of the army as a posse comitatus, except as expressly authorized by the Constitution or by statute.[3] It has been held, however, in spite of that statute, that the provisions of the Constitution vesting the President with the executive power and making it his duty to "take care that the laws be faithfully executed"[4], must be construed as giving to the President the general power of enforcing the laws and the "peace of the United States" by any means that he may find

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[1] Art. IV, Sec. 4.

[2] Lieber, The Use of the Army in Aid of the Civil Power, 30-37, 45; Winthrop, Abridgment of Military Law (2nd ed.), 336-337. Cf. the sending of troops under Gen. Wood to Gary in 1919 to prevent disorder during the steel strike.

[3] Act of June 18, 1878. 20 Stat. at L., 145, 152 (Sec. 15).

[4] Art. II, Sec. 1, Cl. 1; Sec. 3.

necessary.[5] "Congress may, by disbanding the Army, render it impossible for the President to resort to his constitutional power as executive and commander-in-chief of employing the Army in aid of the civil power, in the execution of the laws, or may couple an appropriation for the support of the Army with a condition as to the use of the money appropriated; but, if it be true that the Constitution directly vests the President with (this) duty and power . . , Congress cannot make the exercise of such power illegal. It may prevent its exercise, but it cannot make it illegal."[6]

These constituional powers are also reinforced by statutory authorization to use the armed forces in aid of the civil power in several specific instances. Thus the President is expressly empowered to employ the land or naval forces to such extent as may be necessary for the protection of civil rights; for carrying out the guarantees to the Indians; for the preservation of the public lands and forests; and for the enforcement of the laws with respect to quarantine, extradition, and neutrality.[7]

In none of these instances should the exercise of his powers by the President cause any difficulties or complications with foreign nations, except in the case of the enforcement of the neutrality laws of the United States. In this connection, mention need only be made of such incidents as Washington's famous neutrality

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[5] Lieber, *op. cit.*, 14, 37, 40, 55; *Ex parte Siebold*, 100 U. S., 371, 394-395 (1879); *In re Neagle*, 135 U. S., 1, 63-64, 67, 69(1890).Cf. President Cleveland's use of troops in Chicago during the railroad strike of 1894, over the protest of Gov. Altgeld.

[6] Lieber, *op. cit.*, 56-57. See also opinions of ex-Attorney General Miller and Senator Edmunds. *Ibid.*, 15 n., 43; cf. Pomeroy, *Constitutional Law (Bennett ed.)*, 537-538.

[7] *U. S. Rev. Stats.*, Secs. 1984, 1989; 2118, 2147, 2150-2152; 2460, 5596; 4792, 5275; 23 *Stats. at L.*, 322; 31 *ibid.*, 618; 35 *ibid.*, 1088, 1089. These are conveniently listed in *Army Regulations (ed.1917)*, 106-109.

proclamation of 1793,[8] the Fenian invasion of Canada in 1866,[9] the numerous filibustering expeditions against Cuba and other countries,[10] and the strong feeling of the Central Powers against the manner in which the neutrality of the United States was enforced during the first years of the recent world war, to indicate the delicate nature of the President's responsibility in this regard, and the possible international complications that may result.[11]

The President has also been empowered on some occasions, and on other occasions has exercised the power without specific authority, to undertake military measures for the protection of the so-called "inchoate interests" of the United States -- measures that involve a considerable interference with the rights of other nations and are therefore fraught with serious possibilities. As early as January 15, 1811, a resolution of Congress asserted the peculiar interest of the United States in the Spanish province of Florida and declared, "That the United States, under the peculiar circumstances of the existing crisis, cannot, without serious inquietude, see any part of the said territory pass into the hands of a foreign Power; and that a due regard to their own safety compels them to

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[8] The first neutrality law of the United States was not passed until 1794, hence Washington's proclamation was based not on statutory authority, but on the obligations of neutrality as defined in the law of nations. Writings of George Washington, XII, 281-282. Cf. with Wilson's proclamations of neutrality in 1914. U.S.Stats., 63 Cong., 2 Sess., Pt. 2, Procs., 62 ff.

[9] For an excellent account of this incident, together with the complications it involved, see Oberholtzer, History of the United States since the Civil War, I, 524-537, esp. 528, 532, 534-535.

[10] Latané, America as a World Power, 8-9; Chadwick, Relations of the United States and Spain: Diplomacy, 411-426; Smith, Parties and Slavery, 251-256.

[11] President Polk in 1848 found it difficult to reconcile his frank sympathy for the Irish with his duty to enforce the neutrality laws against American citizens aiding the Irish revolt, and when called upon by the British government to act, hesitated in the hope that the issue might be evaded. With regard to the expedition of the so-called "Buffalo Hunters" against Mexico in the same year, he had no such qualms, but immediately sent instructions to Gen. Tay-

provide, under certain contingencies, for the temporary occupation of the said territory; they, at the same time, declare that the said territory shall, in their hands, remain subject to future negotiation."

Following out the sentiment of this resolution, an act of the same date authorized the President, by means of the military and naval forces, to take possession of, hold, and occupy the territory of East Florida, if necessary to prevent its occupation by any foreign government, and to establish a temporary government over that region; while another act of February 12, 1813, authorized him to take similar action with regard to West Florida.[12]

As a result of these acts, Amelia Island in East Florida, captured from the Spanish in 1811 by a party of so-called "patriots", assisted by a few American troops and gun-boats, was held by the United States and subject to regulations imposed by American officers for more than a year; while in East Florida, the city of Mobile was seized by General Wilkinson in 1813, under orders from the President, and never surrendered.[13]

Again in 1819, the treaty ceding Florida to the United

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lor to use such military force as was necessary to check the movement. Diary of James K. Polk, IV, 104-106, 109, 112.

[12] These are the famous "secret laws" referred to by John Quincy Adams as "those singular anomalies of our system which have grown out of that error in our Constitution which confers upon the legislative assemblies the power of declaring war." He also says that there are four of these secret laws and one resolution; "and one of the laws, that of 25th June, 1812, is so secret that this day it could not be found among the rolls at the Department". Memoirs, IV, 32 (Dec. 30, 1817). The act of 1812 referred to by Adams has apparently not yet been found or published, while the fourth law to which he refers is probably that of Mar. 3, 1811, which placed the ban of secrecy on these acts, including itself. The injunction of secrecy was removed July 6, 1812, but the laws were not published until 1818. See Annals of Cong.,15 Cong.,1 Sess.,II, App., 2601-2604.

[13] Thomas, Military Government in Newly Acquired Territory of the United States, 55-56.

States having been signed, but not yet ratified by Spain, President Monroe suggested to Congress that the interests of the United States in Florida were such that he should be authorized to occupy that territory and carry out the provisions of the treaty as if it were in effect.[14] Military measures for the occupation of Florida were contemplated, even to the extent of reducing St. Augustine by "regular siege", if necessary,[15] but fortunately for the peace of the two countries, Congress did not see fit at that time to authorize such action.[16]

The right of the President to undertake military measures for the protection of these "inchoate interests" of the United States, even without legislative sanction, was apparently first asserted in 1844. In that year President Tyler, having entered into negotiations with Texas for its annexation to the United States, ordered such a concentration of the land and naval forces as to protect Texas against the danger of a Mexican invasion while the treaty of annexation was under consideration in the Senate.[17] In response to a Senate resolution of inquiry, the President defended his action by declaring it as his opinion "that the United States having by the treaty of annexation acquired a title to Texas which required only the action of the Senate to perfect it, no other power could be permitted to invade and by force of arms to possess itself of any portion of the territory of Texas pending your deliberations upon the treaty without placing itself in a hostile attitude to the United

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[14] Message of Dec. 7, 1819. Richardson, Messages and Papers of the Presidents, II, 57; cf. Memoirs of John Quincy Adams, IV, 480.

[15] Jameson, "Calhoun Correspondence", in Report, Am. Hist. Assn. 1899, II, 164-165, 165-166.

[16] The act for carrying the treaty into effect was passed Mar. 3, 1821, while the exchange of ratifications occured in February.

[17] Corwin, The President's Control of Foreign Relations, 156; Reeves, American Diplomacy under Tyler and Polk, 169; Richardson, op.cit., IV, 317.

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States and justifying the employment of any military means at our disposal to drive back the invasion."[18]

In spite of vigorous denunciation of this action in Congress and a threat of impeachment against President Tyler,[19] the same doctrine of an inchoate interest in Texas was advocated by President Polk. He declared that "the moment the terms of annexation offered by the United States were accepted by Texas the latter became so far a part of our country as to make it our duty to afford such protection and defense";[20] and therefore, in May, 1845, he ordered General Taylor to cross into Texas to protect it pending annexation.[21] Clearly, the action of President Polk had more basis than that of President Tyler. Tyler considered himself empowered to protect territory whose acquisition was merely proposed in a treaty not yet ratified, and which, in fact, failed of ratification; while Polk's action had at least the justification that the annexation of Texas was then an assured fact, although at that time not formally in effect.

President Grant's policy with regard to Santo Domingo (1869-1871) likewise involved the principle of an inchoate interest

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[18] Message to Senate, May 15, 1844. Richardson, *op. cit.*, IV, 317.

[19] Reeves, *op. cit.*, 163. Senator Benton replied to the President's message as follows: "This is a reversal of the power of the Senate, and a reading backwards of the Constitution. It makes an act of defeasance from the Senate necessary to undo a treaty which the President sends to us, instead of requiring our assent to give it validity. It assumes Texas to be in the Union, and protected by our Constitution from invasion or insurrection, like any part of the existing States or Territories; and to remain so till the Senate puts her out by rejecting the treaty! This, indeed, is not merely reading, but spelling the Constitution backwards! It is reversing the functions of the Senate and making it a nullifying, instead of a ratifying body." *Cong. Globe*, XIII, App., 498 (28 Cong., 1 Sess., June 1, 1844).

[20] Message to Congress, Dec. 2, 1845. Richardson, *op. cit.*, IV, 388.

[21] *Ibid.*, 388-389; Reeves, *op. cit.*, 277.

on the part of the United States which the President was empowered to protect. Having negotiated with President Baez a treaty of annexation by a most unusual method and almost without the knowledge of his Cabinet, Grant sent a strong naval force to the island to protect it from invasion and from internal disorder, not only during the consideration of the treaty by the Senate, but even after its rejection,[22] on the ground that "the Government of the United States is peculiarly interested in the exemption of the Dominican Republic both from internal commotions and from invasions from abroad."[23]

The President's action was severely condemned on the floor of the Senate, especially by such men as Sumner and Schurz. Schurz declared the doctrine that the President could, by making a treaty, create an inchoate right to some foreign territory, and then, without authority from Congress, commit acts of war for the enforcement of that inchoate right, to be "the hugest absurdity, the most audacious preposterosity, the most mischievous, dangerous, and anti-republican doctrine that ever was broached on the floor of the Senate."[24]

Senator Sumner likewise bitterly scored the action of the President, and offered a resolution condemning the employment of the Navy without the authority of Congress against a friendly foreign nation or in belligerent intervention in the affairs of a foreign nation, as "an infraction of the Constitution of the United States of the part of the United States [illegible] ily selection.[38] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

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[22] Rhodes, History of the United States, VI, 346-354; Corwin, op. cit., 158. For Grant's instructions to the U. S. naval officers, see Moore's Digest of International Law, I, 278.

[23] Secretary of State Fish to Mr. Bassett, minister to Hayti, Nov. 16, 1870. Moore's Digest, I, 279. The treaty had been rejected June 30, preceding.

[24] Cong. Globe, 42 Cong., 1 Sess., Pt. II, App., 52.

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and a usurpation of power not conferred upon the President." The resolution further declared, "That while the President, without any previous declaration of war by act of Congress, may defend the country against invasion by foreign enemies, he is not justified in exercising the same power in an outlying foreign island, which has not yet become part of the United States; that a title under an unratified treaty is at most inchoate and contingent, while it is created by the President alone, in which respect it differs from any title created by act of Congress; and since it is created by the President alone, without the support of law, whether in legislation or a ratified treaty, the employment of the Navy in the maintenance of the Government there is without any excuse of national defense, as also without any excuse of a previous declaration of war by Congress."[25]

However, other Senators, such as Harlan (Iowa) and Morton (Indiana) came to the defense of the President, and Sumner's resolution was laid on the table by a large majority (39-16),[26] so that there would seem to be some point to Professor Corwin's remark about Harlan's argument that it "at least demonstrated the futility of attempting to confine the President's protective function to the mere duty of repelling invasion or immediate physical attack".[27]

President Roosevelt's action in 1903 in preventing the interference of Colombia in the Panama revolution was likewise based

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[25] Cong. Globe, 42 Cong., 1 Sess., Pt. I, 294.

[26] Ibid., 329.

[27] The President's Control of Foreign Relations, 160. President Roosevelt's action with regard to Santo Domingo in 1905 was similar to that of President Grant in that the contemplated measures were undertaken even after a treaty authorizing them had been rejected. Roosevelt's action, however, was not based on the doctrine of inchoate interest, but seems to be more properly classified under the policy of police supervision. Infra.,51; cf. also supra., 36.

on the ground of an inchoate interest on the part of the United States in the Panama Canal and therefore in the success of the revolution.[28]

The President may also on his own authority undertake military measures for the protection of American rights and interests abroad.[29] This power was exercised in 1853 in the famous Koszta incident, when Martin Koszta, a native of Hungary who had become an American declarant (not yet fully naturalized) but who had been seized at Smyrna at the instigation of the Austrian authorities, was released through the vigorous action of an American naval captain in training his guns upon the Austrian vessel on which Koszta was held. The incident caused considerable excitement and was protested by the Austrian government; but Captain Ingraham's action was sustained by public opinion, by Congress, and by the Executive, Secretary of State Marcy laying down the principle that any individual "clothed with our national character" is entitled to claim the protection of this government, "and it may respond to that claim without being obliged to explain its conduct to any foreign power; for it is its duty to make its nationality respected by other nations and respectable in every quarter of the globe."[30]

Another demonstration of this power occurred a year later (1854), when Greytown (San Juan), in Nicaragua, was bombarded "until the town was laid in ashes", in default of reparation demanded for an attack on the United States consul.[31] This action was ap-

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[28] See Jones, Caribbean Interests of the United States, 199-203; Roosevelt, Autobiography, 553-569.

[29] Corwin, op. cit., 142; Root, Military and Colonial Policy of the United States, 157-158.

[30] Rhodes, History of the United States, I, 416-419. The Supreme Court also referred to this incident with approval in a decision rendered some years later. In re Neagle, 135 U.S., 1, 64 (1890).

[31] Rhodes, op. cit., II, 9-10.

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proved and defended before Congress by President Pierce,[32] and later upheld by the courts, Justice Nelson declaring that it is to the President, as the Executive head of the nation, that citizens abroad must look for protection of person and property, and that, for this purpose, "the whole Executive power of the country is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different Departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or force -- a Department of State and a Department of the Navy." He further declared that the duty of such interposition abroad, for the protection of the lives or propery of the citizen, "must, of necessity, rest in the discretion of the President".[33]

The attack by American war vessels upon the Barrier forts of China in 1856, in order to avenge an alleged insult to the flag,[34] undertaken without authority of Congress, was apparently approved even by the cautious Buchanan, although further active participation in a military expedition into Chinese territory was declined as beyond the authority of the President alone to undertake. Secretary Cass thus stated the position of the administration: "Our naval officers have the right -- it is their duty, indeed -- to employ the forces under their command, not only in self-defense, but for the protection of the persons and property of our citizens when exposed to acts of lawless outrage, and this they have done both in China and elsewhere, and will do again when necessary. But military expeditions into the Chinese territory can not be undertaken without

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[32] Message to Congress, Dec. 4, 1854. Richardson, op.cit., V, 280-284.

[33] 4 Blatchford, 451, 454, quoted in Corwin, op. cit., 144.

[34] For account of this affair, see Foster, American Diplomacy in the Orient, 225-227.

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the authority of the National Legislature."[35]

President Buchanan also, without authority from Congress, ordered a naval force to Cuban waters with directions "to protect all vessels of the United States on the high seas from search or detention by the vessels of war of any other nation". A conflict with Great Britain was avoided only the the latter's abandonment of her claim to the right of visit and search in time of peace.[36]

Even the qualification upon the President's powers admitted by Secretary Cass in 1857 was abandoned in 1900, when President McKinley, without any express authorization from Congress, sent a naval force under Admiral Kempff and an army of about 5000 men under General Chaffee to China, not merely for the purpose of rescuing and protecting the lives and property of American citizens in China, but also to cooperate with the forces of the other Powers in avenging and punishing the murder of the representatives of these Powers that had been killed during the Boxer uprising. Although the ensuing campaign involved hard fighting and many casualties, the President said that our declared aims "involved no war against the Chinese

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[35] Cass to Lord Napier, Apr. 10, 1857. Moore's Digest, VII, 164.

[36] Richardson, *op. cit.*, V, 507. Buchanan was, however, curiously inconsistent, deeming it necessary to appeal to Congress for authority to protect American citizens in Nicaragua, New Grenada, and Mexico, and to keep the Panama and Tehuantepec routes of transit open and safe for them. "The executive government of this country", he said, "in its intercourse with foreign nations is limited to the employment of diplomacy. When that fails it can proceed no further. It can not legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks. . . Without the authority of Congress the Executive can not . . , without transcending his constitutional power, direct a gun to be fired into a port or land a seaman or marine to protect the lives of our countrymen on shore or to obtain redress for a recent outrage on their property. . . Without the authority of Congress the President can not fire a hostile gun in any case except to repel the attacks of an enemy." Richardson, *op. cit.*, V, 516, 539, 570.

nation. We adhered to the legitimate office of rescuing the imperiled legation, obtaining redress for wrongs already suffered, securing wherever possible the safety of American life and property in China, and preventing a spread of the disorders or their recurrence."[37]

A still more recent example of this exercise of the President's power is the action of President Wilson in April, 1914, in ordering a force of sailors and marines to capture Vera Cruz by way of reparation for Huerta's affront to the flag of the United States. This measure, characterized by an eminent historian as "an act of war" which looked to Latin-American countries like "the beginning of a war of conquest" and which was "fiercely resented in Mexico", was undertaken without authority from Congress,[38] the city, moreover, being occupied for a period of seven months (until November 23, 1914) by an army of 6000 men under General Funston.[39]

The power of the President to employ the land and naval forces on his own authority, whether for the purpose of protecting the so-called "inchoate interests" and honor of the United States, or the rights and property of American citizens abroad, has thus been demonstrated in actual practice again and again, and seems also to have been approved by Congress, by the courts, and by public opinion. It seems scarcely necessary to suggest the possibilities of international complications and conflicts that may result from an unwise exercise of this power, and hence the enormous responsibility for the peace of the United States that rests in this way upon the shoulders of the President.

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[37] Message to Congress, Dec. 3, 1900. *For. Rel. 1900*, xiv. For an account of the expedition, see Root, *Military and Colonial Policy of the United States*, 333, 336-347; cf. Taft, *Our Chief Magistrate and His Powers*, 114-115.

[38] Vera Cruz was captured Apr. 21, 1914. The next day Congress passed a resolution declaring the use of troops justifiable and disclaiming any purpose to make war. 38 *Stat. at L.*, 770.

[39] Ogg, *National Progress*, 293-295.

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But in addition to these powers of protection, which are, after all, inherent in government, a more recent development of American foreign policy has vested in the President considerable power with respect to intervention and police supervision over the affairs of other nations. The so-called "zone of the Caribbean", because of its proximity and strategic importance to the United States, the unsettled character of the governments in that zone, and the inclination of the United States under the Monroe Doctrine to look with disfavor upon action by any foreign power, is now considered as being under the general police supervision of the United States; the policy of this country having undergone a gradual change from one of sympathetic interest but absolute non-interference in the affairs of these Caribbean states to one of direct and active intervention in their internal affairs.[40]

This power of intervention and police supervision was probably first exercised by President Cleveland in 1885, when during the course of a civil war in Colombia, he sent troops to keep open the transit across the Isthmus of Panama. Although this action was taken under authority of a provision (Article 35) in the treaty of 1846 with Colombia, its execution, as the President informed Congress, "necessarily involved police control where the local authority was temporarily powerless, but always in aid of the sovereignty of Colombia".[41]

The doctrine upon which the exercise of such police con-

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[40] Jones, Caribbean Interests of the United States, 17-23. See also several articles by P. M. Brown -- "Our Caribbean Policy", Proc. Acad. Pol. Sci.; VII, 418-422; "American Diplomacy in Central America", Am. Pol. Sci. Rev., VI, supp., 152-163; "American Intervention in Central America", Am. Jour. Race Development, IV, 409-426.

[41] Message to Congress, Dec. 8, 1885. Richardson, op. cit., VIII, 326.

trol might be justified was laid down by President Roosevelt in his message to Congress, December 6, 1904, when he said: "Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctatntly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power."[42]

The doctrine here laid down has since been developed into a definite policy largely through numerous military measures undertaken on the sole authority of the President. Thus, in 1905, even before he entered into the executive agreement with Santo Domingo already referred to,[43] President Roosevelt directed United States naval forces to interfere and prevent any fighting in that country which might menace the custom-houses.[44] United States marines have since been landed on several occasions both in Hayti and Santo Domingo to preserve order and to maintain the customs service; since 1912 the latter country has been favored with at least one visit a

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[42] For. Rel. 1904, xli.

[43] Supra, 36.

[44] "Santo Domingo had fallen into such chaos that once for some weeks there were two rival governments in it, and a revolution was being carried on against each. . . The situation had become intolerable by the time that I interfered. There was a naval commander in the waters whom I directed to prevent any fighting which might menace the custom-houses. He carried out his orders, both to his and my satisfaction, in thoroughgoing fashion. On one occasion, when an insurgent force threatened to attack a town in which Americans had interests, he notified the commanders on both sides that he would not permit any fighting in that town, but that he would appoint a certain place where they could meet and fight it out, and that the victors should have the town. They agreed to meet his wishes, the fight came off at the appointed place, and the victors, who if I remember rightly were the insurgents, were given the town." Roosevelt, Autobiography, 549.

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[illegible][45] [illegible][46] [illegible] year from United States cruisers; and in 1916 a military occupation of the island was established that has apparently not yet been abandoned (February, 1920).[45]

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In February, 1907, during the course of a war between Nicaragua and Honduras, American warships actively intervened in order to protect life and property from needless destruction and to prevent the spreading of the war, and the American chargé (Philip Marshall Brown) even assumed temporary authority in Honduras when the government fled.[46] In 1909-1910, by the use of naval vessels and marines, the resignation and flight of an obnoxious president of Nicaragua (Zelaya) was forced and the success of a revolution assured;[47] while in 1912 and 1914, United States marines again actively intervened in Nicaragua, but on these occasions on the side of the government to put down revolutions that might otherwise have succeeded.[48] In Honduras, the joint intervention of American and British marines prevented fighting between the two factions in that country, and secured the election of a provisional president agreeable to both factions;[49] while only recently an American naval force was again landed in that country to preserve order during a change of government.[50]

In all these numerous instances of intervention and police supervision in the Caribbean zone, the use of the marines has been

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[45] Ogg, op.cit., 261; Am.Jour.Int.Law, XI, 394-399; see also infra, note 53.

[46] For.Rel.1907, II, 627-628; P.M.Brown, op.cit., in Am.Jour.Race. Development.

[47] For. Rel. 1909, 452-459; ibid. 1910, 738-767.

[48] Jones, op.cit., 176-178; Ogg, op.cit., 261-262. President Taft mentions the intervention of 1912 as "the landing of marines and quite a campaign, which resulted in the maintenance of law and order and the elimination of the insurrectos". He says this was "not an act of war, because it was done at the request and with the consent of the lawful authorities of the territory where it took place." Our Chief Magistrate and His Powers, 96.

[49] P.M.Brown, op.cit., in Am.Jour.Race Development, Am.Pol.Sci.Rev.

[50] N. Y. Times, Sept. 12, 1919.

so common as to warrant the suggestion of a new constitutional principle, that the landing of marines may be considered as a "mere local police measure", while the use of regulars for the same purpose would be an act of war.[51] Intervention is, however, defined in a recent authoritative publication as "an interference by a nation in the affairs of another without the intention of waging war. It is commonly defended as a police measure by the intervening power, but is often followed by war, and may always be regarded by the second power as an act of war.[52] Hence, even though the suggestion of a constitutional principle may be accepted in the United States as justifying the President in his frequent resort to such measures of police control in the zone of the Caribbean, as it apparently has been accepted, this exercise of the President's power may not be so readily accepted by the other countries concerned, but may, on the other hand, be resented by them and lead to serious difficulties and entanglements, if not to actual war.[53]

Recent events have also shown the possibilities involved in an extension of these powers of intervention and police supervision, even beyond the zone of the Caribbean. The landing of United States bluejackets at Trau in September, 1919, in order to prevent a conflict between the Italians and the Serbs, although apparently done at the request of the Italian authorities,[54] was en-

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[51] See Taft, Our Chief Magistrate and His Powers, 95.

[52] War Cyclopedia (1st ed.), 138.

[53] Cf. Jones, op. cit., 190. In the fall of 1919, a commission from Santo Domingo issued a plea for self-government and the abandonment of the American military government; while at about the same time the Spanish government transmitted to Washington a letter from the heads of all the Spanish parliamentary parties, suggesting that the time had come for a termination of the American military occupation of that island. N. Y. Times, Sept. 11 & 12, 1919.

[54] See statement of Admiral Knapp, transmitted by Secretary Daniels to the Senate, Oct. 2, 1919, in response to a Senate resolution. Ibid., Oct. 3, 1919.

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tirely without the previous knowledge or consent of Congress or the Senate.

This use of American forces for police purposes in Dalmatia, and the report that troops were also to be sent to supervise the plebiscites in Silesia and to preserve order in Armenia and elsewhere,[55] aroused a storm of criticism in Congress. The action in Dalmatia was denounced as against law and precedent, and Senator Sherman (Illinois) introduced a resolution declaring that the assignment of foreign territory to be policed or guarded by United States forces was beyond the power of the Supreme War Council or the Executive, without the consent of the Senate.[56]

Such a conception of the President's power with regard to the use of the armed forces might have some weight, had the action under criticism been taken in time of peace. Under the circumstances, however, of a continuing state of war, the correct view was undoubtedly stated by Senator Hitchcock (Nebraska) when he said that the action taken with regard to the Dalmatian coast was within the war powers of the President and delegated by him to the Supreme War Council.[57] The failure of the Senate to take any action on the Sherman resolution would seem to indicate its approval of this view. The incident serves at least to illustrate the possibilities involved in an extension of the sphere within which the President may undertake these military measures without the authority of Congress.

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[55] N. Y. Times Current Hist. Mag., XI, 225-226 (Nov., 1919). According to press reports a force of American troops was sent to Coblenz with a view to their possible use ultimately to help police the plebiscite in Upper Silesia; but Secretary of War Baker announced that these troops would remain at Coblenz as a part of the garrison there, unless the Senate should ratify the treaty and thus make American participation in the plebiscite strictly legal. See N. Y. Times, Nov. 21, 1919.

[56] N. Y. Times, Sept. 27 & 30, 1919.

[57] Ibid., Sept. 30, 1919.

Chapter IV.

Power of Defense.

A formal declaration is not necessary to constitute a state of war, and is a comparatively unimportant factor in dating the beginning of a war, because it does not necessarily precede hostilities, nor has it in fact often done so. Until recently, a formal declaration of war was not, as a matter of international law, necessary or usual.[1] Most wars during the eighteenth and nineteenth centuries were fought "under the rule of a word and a blow, with the blow coming first and the word possibly left unsaid."[2] A declaration of war, says Woolsey,[3] is "a warning issued by a state to its own people, or to the neutral, that war has begun, and not a warning to the enemy that war will begin at a certain future date. Marking thus a status already existing, it cannot itself originate that status. The outbreak of war gives rise to the declaration, not the declaration to the outbreak. . . It is the fact of violence, then, and not the declaration of a status, upon which we must really fix our eyes, if we should ask when war begins."

The question then arises, under what circumstances may a war be begun before a formal declaration is made, or even without a formal declaration, and with what branch of the government the power rests to begin such a war.

Authorities agree that the power to begin an offensive war, or a war of aggression, rests in the United States only with

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[1] S. E. Baldwin, in Am. Jour. Int. Law, XII, 1; Woolsey, International Law, sec. 120; Moore's Digest of International Law, VII, 171.

[2] For a list of wars begun without a declaration, see Am. Jour. Int. Law, II, 57-62.

[3] T. S. Woolsey, "The Beginnings of War", Proceedings, Am. Pol. Sci. Assn., I, 54-68.

Congress, and should properly be preceded by a declaration made by that body.[4] The Constitution establishes the mode in which this government shall commence wars of its seeking, but the Constitution has no power to prescribe the manner in which others should begin war against us. There is in every nation an inherent power of self-defense, and it is to be presumed that, though the power to declare a war is by our Constitution clearly vested in Congress, in the absence of such a declaration the Constitution does not leave the nation powerless for defense against attack. Hence it follows, as Whiting says, "that when war is commenced against this country by aliens or citizens, no declaration of war by the government is necessary."[5]

Whiting also contends that the power to begin and wage a war of defense rests clearly with the President. "The fact that war is levied against the United States", he says, "makes it the duty of the President to call out the army or navy to subdue the enemy, whether foreign or domestic. . . If the commander-in-chief could not call out his forces to repel an invasion unless the Legislative department had previously made a formal declaration of war, a foreign enemy, during a recess of Congress, might send out its armed cruisers to sweep our commerce from the seas, or it might cross our borders and march, unopposed, from Canada to the Gulf before a majority of our Representatives could be convened to make

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[4] Whiting, War Powers under the Constitution, 39; Burgess, Political Science and Comparative Constitutional Law, II, 261; Taft, Our Chief Magistrate and His Powers, 95; Prize Cases, 2 Black, 635, 668, (1862).

[5] Whiting, op. cit., 39; cf. amendment proposed by the Hartford Convention of 1814, providing for a two-thirds vote of both houses to declare war or authorize hostilities, "except such acts of hostility be in defense of the territories of the United States when actually invaded." The Federalist (Ford ed.), Appendix, 689.

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that declaration". He claims that the Constitution, which gives the Legislature authority to declare war whenever initiated by the United States, also imposes upon the President the duty, as commander-in-chief, "to engage promptly and effectually, in war, or, in other words, to make the United States a belligerent nation without a declaration of war or any other act of Congress, whenever he is legally called upon to suppress rebellion, repel invasion, or to execute the laws against armed public resistance thereto."[6] This view is supported by Birkhimer,[7] who admits that a formal declaration of war can be made only by Congress, but says that it is necessary sometimes to prosecute hostilities without such a declaration, and that the President then must act, for the time being, at least, independently of Congress. "When the authorities of the Union are assailed, either by foreign foes, . . or by domestic ones, . . it is the duty of the President to repel force with force without waiting for any formal declaration."

The power of the President to begin and carry on a defensive war without a declaration by Congress is also vigorously upheld by the Supreme Court of the United States. In handing down the decision of the court in the famous Prize Cases,[8] Justice Grier, after admitting the full constitutional power of Congress to declare a national or foreign war, said: "The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the

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[6] Whiting, op. cit., 39-40; cf. Birkhimer, Military Government and Martial Law (2nd ed.), 48.

[7] Military Government and Martial Law, 47; cf. also Chambrun, The Executive Power, 120.

[8] 2 Black, 635 (1862).

several states when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States. If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral'."[9]

That defensive wars are clearly contemplated by the Constitution is shown by the provision which gives to Congress the power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."[10] Under that provision, Congress has, by the acts referred to in the Supreme Court decision, and other acts, vested the President with authority to call out and use the militia in the cases contemplated, and in that sense wage a defensive war without further declaration by Congress.

The Supreme Court need not have rested its case, however,

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[9] Prize Cases, 2 Black, 635, 668 (1862). Cf. Talbot v. Johnson, 3 Dall., 133, 160 (1795): "War can alone be entered into by national authority; it is instituted for national purposes, and directed to national objects. . . Even in the case of one enemy against another enemy, therefore, there is no color of justification for any hostile act, unless it be authorized be some act of the government giving the public constitutional sanction to it."

[10] Constitution, Art. I, Sec. 8, Cl. 15.

solely on those Acts of Congress, but might have gone back to the language and intent of the Constitution itself. The action of the Convention of 1787 is significant in this connection. The Committee on Detail had reported a clause giving to Congress the power "to make war".[11] During the discussion over this proposition, it was suggested that the wording of the clause gave Congress practically unlimited control over all the operations of war. Hence Madison and Gerry moved to strike out the word "make" and insert "declare", with the avowed purpose of "leaving to the Executive the power to repel sudden attacks."[12] The suggested change in language was adopted with little opposition, and there would here seem to be some constitutional sanction for the power of the President to wage defensive wars without direct authorization from Congress.

That power of the President is now at least a generally recognized and well established principle of American constitutional law, the validity of which was vigorously asserted in 1907 by our delegates at the Hague Convention. When the proposal was made for an article requiring that hostilities should not begin without a previous warning, in the form of a declaration of war or of an ultimatum accompanied by a conditional declaration of war, the American delegation expressed its entire sympathy with the purport of the article. It called attention, however, to the fact that Congress under the Constitution had exclusive power to declare war, and that the delegation could enter into no agreement to modify that power in any way. The statement of the delegation then went on to say, however, that it has been the unbroken practice of the Government of the United States for more than a century to recognize in

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[11] Madison's Journal (Hunt ed.), II, 82.
[12] Ibid., 188.

the President, as the Commander-in-Chief of the constitutional land and naval forces, full power to defend the territory of the United States from invasion, and to exercise *at all times and in all places the right of national self-defense*." The delegation announced its willingness to support a proposition favoring a formal declaration of intent to engage in hostilities, providing it were nonmandatory in character.[13]

The power of the President to wage a defensive war without a formal declaration and without specific authorization by Congress is thus, according to all authority, clearly granted, if not in so many words, at least by implication and the inherent purpose of the Constitution. The questions still remain as to what constitutes a defensive war, and to what extent the President may exercise these powers of defense. They are best answered by some references to history.

President Washington had appointed General Wayne to succeed St. Clair in command of the western department, and in the spring of 1794 Wayne was ready to move against the Indians. Meanwhile, the British had established a fort at the rapids of the Miami, twenty miles within American territory, near which the Indians took their stand. The action of the British was, of course, entirely unjustified, and technically constituted an invasion of American territory; but it is not clear that any aggressive act of war was intended. Washington recognized that an attempt to dislodge them would probably bring on a conflict, which he was especially anxious to avoid. He seemed, however, to have no doubts as to his *power* in that regard, for, after weighing carefully the expediency of such action,

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[13] See article by George B. Davis, "The Amelioration of the Rules of War on Land", in *Am. Jour. Int. Law*, II, 63-77.

and without consulting Congress, the following instructions were issued to Wayne by General Knox, the Secretary of War: "If, therefore, in the course of your operations against the Indian enemy, it should become necessary to dislodge the party at the rapids of the Miami, you are hereby authorized, in the name of the President of the United States, to do it."[14] Fortunately, Wayne was able to defeat the Indians without becoming officially involved with the British, and a conflict was for the time being averted.

The question of the extent of the President's powers in the case of a war begun by another nation was more clearly raised in Jefferson's administration, with regard to Tripoli. Tripoli had declared war on the United States because of the latter's failure to comply with demands which Jefferson said were "unfounded either in right or in compact". Jefferson apparently had no doubt of his power to take certain defensive measures without special authority from Congress, for he immediately despatched a small squadron of frigates into the Mediterranean, with orders to protect our commerce against attack. A conflict ensued, as a result of which one of the Tripolitan cruisers was captured together with what remained of her crew. But further than to fight in the strictest defense, Jefferson felt that he had no constitutional authority, and so, as he explained in his message to Congress, "Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its ad-

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[14] Fish, American Diplomacy, 83-84.

versaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight".[15]

It is not strange that such a timid attitude should have aroused the wrath of Hamilton, who attacked the President's interpretation of his war powers in his usual vigorous style. He called it a "very extraordinary position" that, though Tripoli had made a formal declaration of war against the United States and had performed acts of actual hostility, yet there was no power, for want of the sanction of Congress, to capture and detain her crews. That position meant nothing less, he said, than "that between two nations there may exist a state of complete war on the one side -- of peace on the other." Such a position was to him ridiculous. "It is impossible", he maintained, "to conceive the idea, that one nation can be in full war with another, and this other not in the same state with respect to its adversary. The moment that two nations are, in an absolute sense, at war, the public force of each may exercise every act of hostility, which the general laws of war authorize, against the persons and property of the other. As respects this conclusion, the distinction is only material to discriminate the aggressing nation from that which defends itself against attack. The war is offensive on the part of the state which makes it; on the opposite side it is defensive; but the rights of both, as to the measures of hostility, are equal." Hamilton then went on to explain the constitutional phrase granting to Congress the power to declare war,

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[15] Richardson, Messages and Papers of the Presidents, I, 327.

"the plain meaning of which", he said, "is that it is the peculiar and exclusive province of Congress, when the nation is at peace, to change that state into a state of war, whether from calculations of policy, or from provocations, or injuries received: in other words, *it belongs to Congress only, to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by that very fact *already at war, and any declaration on the part of Congress is nugatory*; it is at least unnecessary. This inference is clear in principle, because it is self-evident, that a declaration by one nation against another, produces at once a complete state of war between both, and that no declaration on the other side can at all vary their relative situation; and in practice, it is well known, that *nothing is more common than when war is declared by one party, to prosecute mutual hostilities without a declaration by the other*."[16]

Congress felt somewhat as did Hamilton, that a declaration of war would be a useless formality against a horde of pirates, as the Barbary Powers were considered; but to remove the President's scruples, an act was passed empowering him to proceed with hostilities.[17]

Jefferson himself was evidently not convinced by the argument of Hamilton, for in 1805, in a confidential message to Congress with regard to the Spanish depredations on United States territory, he again asserted the doctrine that only by authority of Congress could any hostile act be performed, beyond the strictest necessities of self-defense. Although the Spaniards had authorized

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[16] *Works of Alexander Hamilton*, VII, 201-204.

[17] McMaster, *History of the People of the United States*, III, 201; Act of Mar. 26, 1804, *Annals of Cong.*, 8 Cong., 1 Sess., App., 1301.

the inference that it was their intention to advance on our possessions, Jefferson wrote: "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided. I have barely instructed the officers stationed in the neighborhood of the aggressions, to protect within the borders actually delivered to us, and not to go out of them but when necessary to repel an inroad, or to rescue a citizen, or his property".[18] Congress took no action beyond referring the message to a committee, and hence the inactive and undecided attitude of the government continued.[19]

In 1818 the question as to the extent of the power of defense came before the administration in a different and more extreme form. President Monroe strongly asserted his right to take defensive measures against the Indians in the South, even to the extent of pursuing them across the border into Florida, at that time a Spanish possession. "The inability of Spain", he said, "to maintain her authority to fulfill the treaty (of 1795),[20] ought not to expose the United States to other and greater injuries. When the authority of Spain ceases to exist there, the United States have a right to pursue their enemy on a principle of self-defence. . . To the high obligations and privileges of this great and sacred principle of self-defence will the movement of our troops be strictly confined." Acting on these principles, the President had given General Jackson orders which clearly authorized him to enter Florida,

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[18] Am. State Papers, For. Rel., II, 613; Annals of Cong., 9 Cong., I Sess., 18-19.

[19] Annals of Cong., 9 Cong., 1 Sess., 947.

[20] Spain had bound herself in this treaty to restrain the Indians from committing hostilities against the United States.

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but only in the pursuit of the Indians, and had carefully instructed him in that case "to respect Spanish authority wherever it is maintained", and "to withdraw his forces from the province as soon as he shall have reduced that tribe to order. . ."[21]

General Jackson accordingly carried the campaign against the Indians into Florida, but in so doing came into conflict with the Spanish authorities, and even stormed a Spanish fort and occupied Pensacola. When the subject of his transaction came before the Cabinet for deliberation, John Quincy Adams argued strenuously in support of the proposition that Jackson's acts were justified as purely defensive measures. "My opinion is", he said, "that there was no real, though an apparent, violation of his instructions; that his proceedings were justified by the necessity of the case, and by the misconduct of the Spanish commanding officer in Florida. The question is embarrassing and complicated, not only as involving that of actual war with Spain, but that of the Executive power to authorize hostilities without a declaration of war by Congress. _There is no doubt that defensive acts of hostility may be authorized by the Executive_; but Jackson was authorized to cross the Spanish line _in pursuit of the Indian enemy_. My argument is that the question of the constitutional authority of the Executive is precisely there; that all the rest, even to the order for taking the Fort of Barrancas by storm, was incidental, _deriving its character from its object_, which was not hostility to Spain, but the termination of the Indian war". Jackson's justification was the eminently practical one that an imaginary boundary line could not afford protection to our frontiers from the Indians in Florida, that the Spanish authori-

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[21] Message to Congress, Mar. 25, 1818. _Am. State Papers, Mil. Affairs_, I, 681; cf. Jackson's defense of himself, _Ibid._, 755-757.

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ties had interfered with the success of his campaign, and that all his operations were founded on those considerations. This argument appealed to Adams, who said that "everything he did was defensive; that as such it was neither war against Spain nor a violation of the Constitution."[22]

This seemed to be a rather extreme view of what constitutes a "defensive measure", and Adams was unable to convince the President and the other members of the Cabinet, all of whom were of the opinion that Jackson had acted not only without, but against his instructions; and that he had committed war upon Spain, which could not be justified and must be disavowed by the administration. The President supposed, however, that there might be circumstances which would have justified such measures as Jackson had taken, but that he had not made out his case.[23]

President Wilson's despatch of a punitive expedition into Mexico after the Columbus raid in March, 1916, involved the exercise of powers of defense similar to those claimed by Monroe in 1818. The expedition was thought to be necessary in order to protect the United States against bandit raids which events had apparently shown the Mexican government too weak to suppress. In a statement to the press, President Wilson announced that the expedition would have the "single object" of capturing Villa and putting a stop to his forays. "This", he said, "can and will be done in entirely friendly aid of

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[22] Memoirs of John Quincy Adams, IV, 108, 111. About a year later, Adams advised the President that the occupation of Florida, a measure then proposed, would be "in itself an act of war. It may very probably involve us in a real and very formidable war". He very frankly admits, however, that this opinion did not reflect his real views, but was given in order to secure just that result, since he had discovered that his advice usually resulted in the opposite action being taken. Memoirs, IV, 450.

[23] Ibid., 108.

the constituted authorities in Mexico and with scrupulous respect for the sovereignty of Mexico."[24] Though the expedition later involved threatening complications with the Mexican authorities, and even some encounters with Mexican troops that resulted in bloodshed,[25] it is justified by eminent authority on the ground that "the President was in this instance but performing his constitutional function of repelling invasion."[26]

The President has also in another way shown himself able to exercise important powers of defense without express authorization from Congress. When the difficulty with France reached a crisis in 1798, President Adams announced to Congress that he had revoked his former instructions to collectors not to permit the sailing of armed merchant vessels, and thereby indirectly authorized the arming of such vessels as a measure of defense.[27] This exercise of Executive power was opposed by Jefferson, who looked upon it as a measure leading to war and proposed that there should be "a Legislative prohibition to arm vessels instead of the Executive one which the President informs them he has withdrawn."[28]

That suggestion was favored also by Madison, who denounced the action of the President as a usurpation of power. "The first instructions", he said, "were no otherwise legal than as they were in pursuance of the Law of Nations, & consequently in execution of the law of the land. The revocation of the instructions is a virtual change of the law, & consequently a usurpation by the Ex. of a legislative power. It will not avail to say that the law of Nations

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[24] See Am. Jour. Int. Law, X, Supp., 180, 184.
[25] For a brief account, see Ogg, National Progress, 297-299.
[26] Corwin, The President's Control of Foreign Relations,163,n.
[27] Message of Mar. 19, 1798. Richardson, op. cit., I, 265.
[28] Jefferson to Monroe, Mar. 21, 1798. Writings of Thomas Jefferson, VII, 221.

leaves this point undecided, & that every nation is free to decide for itself. If this be the case, the regulation being a Legislative not an Executive one, belongs to the former, not the latter Authority; and comes expressly within the power, 'to define the law of Nations', given to Congress by the Constitution."[29]

While the right of the President to authorize the arming of merchant vessels for defense was thus disputed, the seriousness of such action was not questioned even by his supporters, but, on the other hand, it was frankly admitted to be a step leading to war.[30]

More recently the President's right to exercise this power of arming merchant vessels for defense again became a sharp issue. Germany having announced the renewal of her ruthless submarine warfare, President Wilson went before Congress February 26, 1917, and asked for authority "to arm our merchant vessels with defensive arms should that become necessary, and with the means of using them, and to employ any other instrumentalities or methods that may be necessary and adequate to protect our ships and our people in their legitimate and peaceful pursuits on the seas." While thus requesting express authority, the President at the same time announced that he considered himself as already possessing that authority "without special warrant of law, by the plain implication of my constitutional duties and powers." He said, however, that he preferred under the circumstances not to act upon such general implication, but wished to feel "that the authority and power of the Congress are behind me in whatever it may become necessary for me to do."[31]

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[29] Madison to Jefferson, Apr. 2, 1798. *Writings of James Madison*, VI, 313. Cf. *Constitution*, Art. I, Sec. 8, Cl. 10.

[30] William Vans Murray, minister at The Hague, wrote as follows to John Quincy Adams, June 1, 1798: "I have seen the circular, it permits arming in defence. It was all that the President could authorize, but *it is war*". *Report, Am. Hist. Assn. 1912*, 416.

[31] *N. Y. Times Current Hist. Mag.*, VI, 48.

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The bill granting the authority asked for was favored by an overwhelming majority in both houses of Congress, but was defeated by a filibuster in the Senate, the measure being opposed principally on the ground that it was a step leading to war, and therefore a delegation of the war-making power of Congress to the President. The view of this "little group of wilfull men" -- as they were characterized by President Wilson in a public statement -- was perhaps best expressed by Senator Stone (Missouri), when he said: "This bill, if enacted, would confer power upon the President to initiate war, if he should so desire or determine, and to do that supremely solemn thing without first submitting the choice of war or peace to the Congress." Regarding the President's claim to that power without express authorization, he said: "I can not consent that this clause (i. e., the clause of the Constitution giving the President power to execute the laws) confers, or was ever intended to confer, power upon the President to determine an issue between this Nation and some other sovereignty -- an issue involving questions of international law -- and to authorize him to settle that law for himself, and then proceed to employ the Army and Navy to enforce his decision".[32]

In spite of the failure of Congress to grant his request for express authority, President Wilson, still convinced of his own power, and fortified not only by the known sentiments of the majority in Congress but also by the advice of his Secretary of State and

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[32] Cong. Record, LIV, Pt. 5, (64 Cong., 2 Sess.), 4878, 4884.

Attorney General,[33] gave formal notice on March 12 of his determination "to place upon all American merchant vessels sailing through the barred areas an armed guard for the protection of the vessels and the lives of the persons on board". Accordingly, a large number of merchant vessels were equipped with six-inch guns and gunners from the United States Navy were assigned to man them, supposedly with instructions not to await an attack by a submarine, but to fire at sight, the presence of a submarine presupposing its hostile intent.[34]

The expedient of armed neutrality so adopted by the Executive as a measure of defense merely, was later acknowledged by President Wilson himself, in his war address of April 2, to be not only "impracticable" and "ineffectual enough at best", but under the circumstances even "worse than ineffectual" and "*practically*

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[33] *N. Y. Times Current Hist. Mag.*, VI, 55-56. An Act of Mar. 3, 1819, provided that any merchant vessel of United States registry might, by armed force, oppose or defend against "any aggression, search, restraint, depredation, or seizure", attempted by any other merchant vessel or "any armed vessel whatsoever, *not being a public armed vessel of some nation in amity with the United States.*" This act, still in force, was held by some to forbid the action contemplated by the President, since Germany was still officially a nation "in amity with the United States". Secretary Lansing and Attorney General Gregory advised the President, however, that the statute had been enacted with reference to protection against the pirates of that time and could not be held to apply to the present circumstances. See the act in *Annals of Cong.*, 15 Cong., 2 Sess., II, App., 2523.

[34] *N. Y. Times Current Hist. Mag.*, VI, 56. "Because submarines are in effect outlaws when used as the German submarines have been used against merchant shipping, it is impossible to defend ships against their attacks as the law of nations has assumed that merchantmen would defend themselves against privateers or cruisers, visible craft giving chase upon the open sea. It is common prudence in such circumstances, grim necessity, indeed, to endeavor to destroy them *before they have shown their own intention. They must be dealt with upon sight*, if dealt with at all." Address to Congress, Apr. 2, 1917. McKinley, *Collected Materials for the Study of the War* (1st ed.), 13.

certain to draw us into the war without either the rights or the effectiveness of belligerents."[35]

In 1846, the question of the President's powers of defense was raised in an even more complicated and contentious form. The events leading up to the Mexican War involved the question of the President's power to recognize a state of war as already existing, and thereby begin defensive measures without authorization from Congress. They also illustrate to what extent hostile acts may be performed by a vigorous President in bringing about such a state of war, and how far operations may be conducted in the name of "defense".

General Taylor had been sent, after the annexation of Texas, to occupy the disputed territory beyond the Nueces River, with instructions, however, -- so the President said -- "to abstain from all aggressive acts toward Mexico or Mexican citizens, and to regard the relations between that Republic and the United States as peaceful unless she should declare war or commit acts of hostility indicative of a state of war."[36] President Polk, however, had also, in the fall of 1845, instructed Taylor that the crossing of the Del Norte by the Mexican army was to be regarded as an act of war, and in that event he should not wait to be attacked, but should attack first. Moreover, he was not only to drive the invaders back across the river, but he was vested with discretionary authority to pursue the Mexican army into Mexican territory, and to take Matamoras or any other post on that side of the river, with only the caution "not to penetrate any great distance into the interior of Mexican Territory." Likewise Commodore Conner, commanding the American squadron

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[35] McKinley, op. cit., 14.
[36] Richardson, op cit., IV, 441.

in the Gulf of Mexico, was instructed in a similar event to blockade all the Mexican ports on the Gulf, and to attack and take them if practicable, excepting only Yucatan and Tobasco, which had been reported as against the threatened war with the United States.[37]

The President evidently held none of Jefferson's timid views with regard to the Executive's powers of defense. Polk expected war, he was indeed fully determined on war, but meant that the war should be "defensive" on the part of the United States. He had no intention, however, of limiting such a war of defense to merely repelling invaders. Polk did make inquiry of one of his friends in Congress (Senator Bagby of Alabama) as to the necessity or propriety of calling Congress, in the event of a declaration of war or an invasion of Texas by Mexico, and was plainly relieved when the Senator gave it as his "clear opinion" that Congress should not be called.[38]

Having thus manipulated the situation so that actual hostilities were finally precipitated on the morning of April 25, President Polk thus summed up the situation in his message of May 11, 1846: "After reiterated menaces, Mexico has passed the boundary of the United States, has invaded our territory, and shed American blood upon the American soil. She has proclaimed that hostilities have commenced, and that the two nations are now at war. _As war exists_, and, notwithstanding all our efforts to avoid it, _exists by the act of Mexico herself_, we are called upon by every consideration of duty and patriotism to vindicate with decision the honor, the rights, and the interests of our country. . . In further vindication of our rights and defense of our territory, I invoke the prompt

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[37] _Diary of James K. Polk_, I, 9, 12.
[38] _Ibid._, I, 13.

action of Congress to recognize the existence of war, and to place at the disposition of the Executive the means of prosecuting the war with vigor, and thus hastening the restoration of peace."[39]

Even before the President asked Congress thus to "recognize the existence of war", his instructions of the year before had been carried out, two battles had been fought,[40] and the war was already being carried on -- without any declaration or authorization by Congress. In Congress, in fact, the President's statement that "war exists by act of Mexico", and his consequent assumption that the war would be a "defensive" one, were not accepted without dispute. Senator Benton, for example, was willing to vote men and money for defense of American territory, but was not prepared to make aggressive war on Mexico. He left it to be inferred that he did not think the territory of the United States extended west of the Nueces River, and therefore he had not approved Taylor's occupation of that region.[41]

Mr. Morehead (of Kentucky) denied that war could exist without some prior action on the part of Congress. "If war does now exist", he said, "- if the people of the United States now find themselves in a state of war with Mexico, it is a war which has not been brought about or declared by the legislative department of the United States, to which constitutionally the power of declaring war belongs. The President of the United States has no constitutional power to involve the nation in war. But if war does exist at this time between the United States and Mexico, it may follow that

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[39] Richardson, _op. cit_., IV, 442, 443.

[40] Palo Alto and Resaca de la Palma, on May 8 and 9, respectively.

[41] _Diary of James K. Polk_, I, 390. Benton also suggested that a peaceable adjustment might be had, referring to the proclamation of the President _ad interim_ of Mexico denying his own right to declare war but leaving it to the consideration of the Mexican Congress. See Benton's _Abridgment of the Debates of Congress_, XV, 499.

the President of the United States may involve the country in war without the assent of the legislative department of the Government."[42] Mr. Archer (of Virginia) likewise declared that the intervention of Congress was absolutely indispensable to constitute war, that the existence of hostilities on one of the frontiers of the United States did not necessarily put us in a state of war with a foreign power; that the President's statement could not alone be accepted as indicating a state of war, since an investigation might show the state of things on the Rio Grande to be misunderstood and the Mexican authorities to have acted justifiably; that if the President's statement were to be accepted as a legal and constitutional acceptation of a state of war, then the officers and men on the Rio Grande might involve the country in war at their pleasure.[43]

The most vigorous assailant of the President's declaration was Calhoun, who insisted that "in the sense of the Constitution war could be declared only by Congress", that only through its authority could the state of things called "war" be announced to the country and the world. "War must be made", he said, "by the sovereign authority, which in this case, were the Mexican Congress, on the one side, and the American Congress, on the other. The President of Mexico could not make war. It could be done only by the two countries. Even if the two Presidents had declared war, the nations could disavow the act." He declared it was "monstrous" that he should be asked to affirm "that a local rencontre, not authorized by the act of either Government, constituted a state of war between the Government of Mexico and the Government of the United States -- to say that, by a certain military movement of General Taylor and

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[42] Benton's Debates, XV, 489, 492.
[43] Ibid., 489, 490.

General Arista, every citizen of the United States was made the enemy of every man in Mexico. . . It stripped Congress of the power of making war; and, what was more and worse, it gave that power to every officer, nay, to every subaltern commanding a corporal's guard."[44]

The President was, of course, not lacking in supporters, among them General Cass, who took direct issue with Calhoun. "There can be no hostilities undertaken by a government", he said, "which do not constitute a state of war. War is a fact, created by an effort made by one nation to injure another. One party may make a war, though it requires two parties to make a peace." While admitting that Congress alone has the right to declare war, and that "no authority but Congress can commence an aggressive war", yet he asserted that another country "can commence a war against us without the cooperation of Congress", that it can, "at its pleasure, terminate the relations of peace with us, and substitute for these the relations of war, with their legitimate consequences. War may be commenced with or without a previous declaration. It may be commenced by a manifesto announcing the fact to the world, or by hostile attacks by land or sea." Whether or not the disputed territory rightfully belonged to the United States or to Mexico made no difference, in the opinion of Cass. The ultimate claim to the country was a matter for diplomatic adjustment, but the United States was meanwhile in possession, and any attempt to dislodge her forces was an act of aggression and an act of war. Hence he argued that the war became for the United States one of defense.[45]

Under the stress of the patriotic feelings aroused by the

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[44] Benton's Debates, XV, 491, 497, 500.
[45] *Ibid.*, 503, 504.

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shedding of American blood, and under the plea that the war was strictly one of defense, Congress sustained the President, recognized a state of war as already existing by act of Mexico, and authorized the carrying on of hostilities.[46] Its real feelings were, however, perhaps better expressed when the House of Representatives, about two years later, passed a resolution "that the war was unnecessarily and unconstitutionally begun by the President of the United States".[47]

Lincoln's proclamation of blockade of the Southern ports in April, 1861, again raised the question of the President's power to recognize the existence of a state of war without a declaration by Congress. The situation was all the more peculiar, in that this was not a foreign war, but an insurrection, and therefore a blockade of the Southern ports was really a blockade of the nation's own ports, something unknown to international law. Nevertheless, the Supreme Court, in the decision of the Prize Cases already referred to, sustained the validity of the President's action, and asserted his right to recognize a state of war as already existing, and to take measures of defense in advance of Congressional authority. "A civil war is never solemnly declared," said the Court, "it becomes such by its accidents -- the number, power, and organization of the persons who originate and carry it on. . . As a civil war is never publicly proclaimed eo nomine against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know. The true test of its existence . . . may be thus summarily stated: When the regular course of justice is inter-

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[46] Act of May 13, 1846. 9 Stat. at L., 9.

[47] See amendment of Mr. Ashmun to resolution of thanks to Gen. Taylor, adopted Jan. 3, 1848. On Feb. 14, 1848, the House tabled a motion to expunge this amendment from the Journal. Cong. Globe, 30 Cong., 1 Sess., 95, 343-344.

rupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land." The Court held that the question of fact as to when an insurrection has reached such alarming proportions as to be called a war and the insurgents to be accorded the character of belligerents, is a question to be decided by the President in his capacity as Commander-in-Chief. The Court would be governed by the decisions and acts of the political department to which the power was entrusted. "The proclamation of blockade," said the Court, "is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case".[48] The Court thus in effect held that, while the existence of a state of war was necessary to the validity of a blockade, the fact that a blockade had been proclaimed was proof that a state of war existed; and the President having authority to proclaim the blockade, was thereby empowered to declare the existence of a war, and bind the Court and the country to his declaration.

Four Justices, including Chief-Justice Taney, dissented vigorously from this opinion. They argued that, although Congress had conferred upon the President authority to meet sudden emergencies -- to repel invasions and suppress insurrections -- that authority did not invest him with the war power. If so, they maintained, then we are in a state of war every time a military force is called out, "for the nature of the power cannot depend upon the numbers called out." "The Acts of 1795 and 1807", they said, "did not, and

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[48] Prize Cases, 2 Black, 635, 666, 667, 670, (1862).

could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed. . . This great power is reserved to the legislative department by the express words of the Constitution, and cannot be delegated or surrendered to the Executive". The minority held, therefore, that if the insurrection were to be placed on the footing of a war, within the meaning of the Constitution, and be accorded belligerent rights under international law, it must be recognized or declared as a war by the war making power of the Government, that is, by Congress. "There is no difference in this respect", said the Justices, "between a civil and a public war."[49]

Such an eminent authority as Professor Willoughby is inclined to agree with the minority rather than with the majority of the Court. He says that while all nations have the power and right, in case of a civil contest in another State, to determine whether the struggle is to be treated as a war and the contestants as belligerents, yet the State concerned is not bound by such action and may continue to treat the insurgents as rebels. Therefore, he says, "it would seem that, in the United States, from the constitutional viewpoint, it should lie with the war-declaring power, that is, with Congress, to determine when the civil struggle should be recognized as a war."[50]

Whether or not we agree with Professor Willoughby and the minority of the Court as presenting the most logical argument from a strictly constitutional standpoint, the decision of the majority stands as law in the United States, as it also represents the more practical point of view. The Constitution, made as it was by practi-

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[49] Prize Cases, 2 Black, 688-689, 690-693.
[50] Willoughby, On the Constitution, II, 797.

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cal men who had just emerged from a long, hard struggle of defense, must be construed as giving the power to take measures for defense as quickly as those measures may be needed. While the decision of the Court in this case upheld particularly the President's power to recognize an insurrection as a "state of war" and undertake the necessary defensive measures in that case without authority from Congress, the principle has also been held to apply to foreign wars as well. "In fact", says one authority, "according to the terms of the judicial decision just cited, a President who conducts affairs with a foreign power, so as skillfully to lead it to attack the United States, can always engage the action of the country and inaugurate defensive war. In a word, his remaining on the defensive is all that is required to authorize him to act."[51]

It has been noted how the power of defense has been assumed and asserted by the Executive, in varying degree, as a necessary and inherent function of his office. The law and practice are thus in accord as to the nature and location of the power. With regard to the extent to which the President may constitutionally exercise this power of defense, Professor Corwin draws an analogy between this Presidential power and the right of a state under international law to self-preservation, and concludes that while the power is theoretically reserved for "grave and sudden emergencies", in practice it is limited only by the "powers of Congress and public opinion".[52]

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[51] Chambrun, The Executive Power, 121-122. Cf. McClain, Constitutional Law in the United States, 190; Schouler, Constitutional Studies, 139; Ogg & Beard, National Governments and the World War, 102; Senate Document No. 56, 54 Cong., 2 Sess., 5.

[52] The President's Control of Foreign Relations, 156.

Chapter V.

Powers with regard to a Declaration of War.

The Constitution gives to Congress the power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water".[1] Those functions were not granted to Congress as a matter of course, but only after much serious thought and discussion. The Congress under the Confederation had the "sole and exclusive right and power of determining on peace and war";[2] but the decision in the Convention of 1787 to create separate and distinct departments of government in pursuance of Montesquieu's theory of the separation of powers, opened up anew the whole matter of the proper functioning of each department, including the question of the proper depository for the war-making functions.

Hamilton had suggested, in his plan presented quite early in the course of the Convention,[3] that the power of declaring war should be vested exclusively in the Senate,[4] but the report of the Committee of Detail gave to the legislature as a whole the power "to make war".[5] When this clause came up for consideration on August 17, it because a subject for warm debate. Mr. Pinkney opposed vesting the power in the Legislature, whose proceedings he said were too slow; the House of Representatives he thought too numerous a body for such deliberations; and hence he agreed with

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[1] Art. I, Sec. 8, Cl. 11.

[2] Articles of Confederation, Art. IX, in Macdonald's Documentary Source-Book of American History, 199.

[3] June 18.

[4] Madison's Journal (Hunt ed.), I, 163.

[5] Ibid., II, 82.

Hamilton that the Senate was the best depository.[6] Mr. Butler thought the objections against the Legislature would operate in great degree also against the Senate, and favored vesting the power in the President, "who will have all the requisite qualities and will not make war but when the nation will support it". Mr. Sherman, on the other hand, thought the Executive should not be able to commence war; and Mr. Gerry "never expected to hear in a republic a motion to empower the Executive alone to declare war". Mr. Mason likewise thought the Executive was not safely to be trusted with the war power, nor was the Senate in his opinion so constructed as to be entitled to it. "He was for clogging rather than facilitating war; but for facilitating peace". As a final conclusion, the word "declare" was substituted for the word "make", and the power "to declare war" was entrusted to the Legislative body.[7]

It seemed evident to the makers of the Constitution that a power involving such tremendous consequences must in a representative government rest with the body most directly representative of the people. To vest the power of declaring war in the Executive savored too much of monarchy and of old-world institutions. Few have disputed the wisdom of that theory, few would do so today. Nevertheless, such an intense American as John Quincy Adams, spoke in 1817 of the provision which confers upon the legislative the power of declaring war as "that error inthe Constitution" and a piece of "clumsy political machinery." He thought that, in the theory of government according to Montesquieu and Rousseau, the power of de-

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[6] Pinkney had earlier in the Convention (June 1) expressed his fear of extending the "powers of peace and war" to the Executive, which he said would render the Executive a "monarchy of the worst kind, to wit, an elective one." Madison's Journal (Hunt ed.), II, 49.

[7] For the debate on this entire proposition, see ibid., II, 187-189; Farrand's Records of the Federal Convention, II, 318-320.

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claring war is "strictly an Executive act".[8]

It is believed that a brief examination will show, that though the power to begin war through a formal declaration is clearly and definitely granted to Congress, the President is by no means excluded from all share in such declaration. A declaration of war is a simple legislative act, going through the same procedure as any other legislative measure, and requiring no extraordinary majority for its passage.[9] The President has therefore all the rights and powers in connection with a declaration of war that he has with regard to matters of ordinary legislation. Judge Baldwin[10] remarks that there may be said to be three stages in a declaration of war: (1) Doings of the President in informing Congress of the state of relations with the Power against which war may be declared; (2) doings of Congress in making the declaration; and (3) approval of the declaration by the President.

In the first place, then, the President, under the constitutional provision requiring that he "shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient",[11] is empowered to recommend a declaration of war, first communicating to Congress the facts and circumstances

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[8] Memoirs of John Quincy Adams, IV, 32; but cf. XII, 51.

[9] It is rather curious to note that Jefferson was for a time under the impression that a two-thirds majority was required to pass a declaration of war. He later admitted his error on this point. Writings of Thomas Jefferson, VII, 220, 222, 243-244. The New York ratifying convention of 1778 proposed an amendment requiring a two-thirds majority of each house to declare war, and a similar amendment was proposed by the Hartford Convention in 1814, neither of which received any serious consideration. See The Federalist (Ford ed.), Appendix, 643, 689.

[10] S. E. Baldwin, "The Share of the President in a Declaration of War", Am. Jour. Int. Law, XII, 1-14.

[11] Art. II, Sec. 3.

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that in his opinion call for such declaration. The President, through this power of giving information to Congress and of recommending measures to be taken, may largely influence that body in determining upon war or peace. He may withhold certain information, the disclosure of which would vitally affect the action of Congress. He may, if he is desirous of war, reveal only such information as will tend to inflame Congressional opinion, or he may select a moment for his disclosures and recommendations when opinion is excited and ready to hear the worst.

Thus Jefferson charged that President Adams "kept out of sight in his speech" (of May 16, 1797)[12] Spanish protests and demands, and "thereby left it to be imagined that France is the only power of whom we are in danger;" that the Executive had war in contemplation, with the expectation that the legislature "might catch the flame"; that the convocation of Congress[13] was in fact only "an experiment on the temper of the Nation, to see if it was in unison".[14] Both Jefferson and Madison charged that the X Y Z correspondence was laid before Congress for the particular purpose of arousing the war temper of that body and of the country. In his message of March 19, 1798,[15] the President, without revealing the content of the famous despatches, spoke pessimistically about the accomplishments of the mission to France, urged the adoption of defensive measures, and announced the action he himself proposed to take. Referring to this message, Madison wrote: "The Constitution supposes, what the History of all Governments demonstrates, that the

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[12] Richardson, Messages and Papers of the Presidents, I, 233-239.

[13] Congress had been summoned to meet in special session May 15, 1797.

[14] Writings of Thomas Jefferson, VII, 126, 138-139, 146,148-149.

[15] Richardson, op. cit., I, 264-265.

Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature. But the Doctrines lately advanced[16] strike at the root of all these provisions and will deposit the peace of the Country in that Department which the Constitution distrusts as most ready without cause to renounce it. For if the opinion of the President[17] not the facts and proofs themselves, are to sway the judgment of Congress in declaring war, . . it is evident that the people are cheated out of the best ingredients in their Government, the safeguards of peace which is the greatest of their blessings."[18]

Madison was equally vigorous in referring to the actual revelation of the famous papers. "It is easy to foresee," he wrote, "the zeal and plausibility with which this part of the despatches will be inculcated, not only *for the general purpose of enforcing the war measures of the Executive*, but for the particular purpose of diverting the public attention from the more important part, which *shows the speech and conduct of the President to be now the great obstacle to accommodation*. . . The readiness with which the papers were communicated and the quarter proposing the call for them,[19]

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[16] Madison evidently refers here to the proposed measures of defense, especially the announcement of Adams that armed merchantmen of the United States would now be permitted to sail, whereas before the collectors had instructions to hold such vessels in port. See Richardson, *op. cit.* I, 265; also *supra*., 67-68.

[17] Adams had expressed his opinion, formed from an examination of the correspondence, that the objects of the mission to France could not be accomplished "on terms conpatible with the safety, the honor, or the essential interests of the nation", and that the nation should prepare for defense. Richardson, *op. cit*., I, 264. It should be remembered that the correspondence had not yet been laid before Congress.

[18] *Writings of James Madison*, VI, 312-313.

[19] The X Y Z correspondence was submitted to Congress April 3, 1798, in response to a resolution of the House calling for the same, passed April 2. See *Annals of Cong*., 5 Cong., II, 1370, 1371.

would be entitled to praise if a mass of other circumstances did not force a belief that the view in both was *more to inflame than to inform* the public mind."[20]

A study of the debates in Congress shows that Jefferson and Madison were not alone in their contention that the President was manipulating the situation and molding Congress to war. Mr. Livingston suggested that since Congress had been practically called upon to decide between peace and war, it was entitled to see the whole correspondence. "The right to judge what it was proper to publish in consideration of the public safety and interest, should not be transferred to the President, *as he might withhold such parts of the papers as might prevent a correct judgment being formed upon* them."[21] Mr. Gallatin had opposed the call for the papers and favored going ahead at once to determine on peace or war, since, as he said, "if it had first been determined to call for further information, *how did he know that it would be given, or, if given, whether it would be in a mutilated state*, rather than which he would choose to act without it upon the Message of the President alone. . . It was true, when the concessions were made known, it was possible that he might differ in opinion from the President as to their reasonableness; but this House has no control over the President in this respect. Therefore, the information which he has given to the House is sufficient for them; and they ought now to say whether they will go to war or remain in peace."[22] Many members expressed their belief that the President's message was tantamount to a declaration

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[20] *Writings of James Madison*, VI, 316; cf. *Writings of Thomas Jefferson*, VII, 235-236.

[21] *Annals of Cong*., 5 Cong., II, 1359.

[22] *Ibid*., 1363.

of war against France.[23]

In fact, the messages and actions of the President were considered as so inflammatory of the war passions, that Mr. Sprigg of Maryland, in order to counteract that effect, proposed a resolution "that it is not expedient for the United States to resort to war against the Republic of France".[24] Such a negative resolution was very unusual, and its propriety was strongly questioned, both in Congress and out.[25] Madison admitted that it was "in ordinary cases . . . certainly ineligible", but he thought that cases might obviously arise for which it was proper: "1. where nothing less than a declaration of pacific intentions from the department entrusted with the power of war, will quiet the apprehensions of the constituent body, or remove an uncertainty which subjects one part of them to the speculating arts of another; 2. where it may be a necessary antidote to the hostile measures or language of the Executive Department. . ; 3. where public measures or appearances may mislead another nation into distrust of the real object of them, the error ought to be corrected; and in our Government where the question of peace or war lies with Congress, a satisfactory explanation cannot issue from any other Department".[26] Madison and a large number in Congress were convinced that an obvious case had arisen, that the President was deliberately trying to lead Congress into a declaration of war.

Whatever the truth in these charges against Adams, the above-mentioned resolution failed of passage, and it is clear that when the crisis was at its height in 1798, the President had brought

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[23] See, for example, the remarks of Giles and Gallatin. Annals of Cong., 5 Cong., II, 1323, 1364.
[24] Ibid., 1319.
[25] See the debate on the resolution. Ibid., 1319-1357.
[26] Writings of James Madison, VI, 317-318.

matters to a point where "both Houses were safely committed to any policy of vigor which he would recommend."[27] The sentiment of Congress was perhaps best expressed by Mr. Otis when he said that "the President having declared his opinion that there is no hope of success from that mission, he wished for nothing further to convince him of the propriety of going into the different defensive measures proposed."[28] Under the President's leadership, therefore, acts of hostility were authorized,[29] and for more than two years a "limited or imperfect war" was carried on.[30] Even so, peace was undoubtedly "the first object of the nation", as Jefferson had grudgingly acknowledged;[31] no formal declaration was asked for or made, and Adams is generally credited with having "probably saved the country from war and from internal dissensions".[32] Certainly there was not a moment during his entire administration when Adams, by a word, might not have secured from Congress a declaration of war. He refrained from speaking the word, and a disastrous war was avoided.

President Jefferson was also able to prevent a declaration of war during his administration, though under somewhat different circumstances. The long series of incidents arising from the strained relations with Great Britain had culminated on June 22, 1807, in the attack of the Leopard upon the Chesapeake. The country was aroused as it had not been since the battle of Lexington.[33] "Never", says an eminent historian, "had a more just cause for war been given

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[27] Bassett, The Federalist System, 237.

[28] Annals of Cong., 5 Cong., II, 1370.

[29] Acts of May 28 and July 9, 1798; ibid., 5 Cong., III, App. 3733, 3754.

[30] Bas v. Tingy, 4 Dall. 37; Gray v. U. S., 21 Ct. of Cl. 340, in Scott's Cases on International Law, 452.

[31] Writings, VII, 149.

[32] Bassett, op. cit., 251; cf. also Bascom, Growth of Nationality, 26.

[33] Writings of Thomas Jefferson, IX, 105.

to any people. Never had a people called more loudly for war."[34]

Jefferson believed that it was strictly within the province of Congress to determine whether the outrage was a proper cause of war, and that the Executive should be careful not to perform any act that would commit Congress to a particular course. He might therefore have summoned Congress at once to meet in special session to consider the extraordinary situation that had arisen. Jefferson and his Cabinet knew, however, that were Congress to meet while the excitement was at its height, it would be difficult to prevent an immediate declaration of war, or at least some action that would hopelessly embarrass the negotiations about to begin at London. He hoped that a delay would bring cooler counsels and some chance for adjustment, that, "having taught so many useful lessons to Europe, we may . . . add that of showing them that there are peaceable means of repressing injustice, by making it to the interest of the aggressor to do what is just, and abstain from future wrong".[35] He therefore issued a proclamation setting forth the grievances of the United States and declaring the ports closed to the armed ships of England;[36] but, under the pretence that Washington was too sickly a place for Congress to come to in the summer, its date for assembling was fixed at October 26.[37]

The delay proved useful. The British government sent a minister to adjust the Chesapeake affair, recalled the Admiral who gave the order for the attack, and disavowed his act.[38] Thus Jefferson, if he did not succeed in finally averting a war with Great Britain, at least, by refusing to summon Congress at the moment of

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[34] McMaster, History of the People of the United States, III, 262.
[35] Writings, IX, 87-88.
[36] Richardson, op. cit., I, 422.
[37] Ibid., 424.
[38] McMaster, op. cit., III, 263, 269-270.

excitement, delayed the war for several years.

President Madison aroused the war passion of Congress in 1812 by submitting to it the "Henry correspondence", which aimed to show that Great Britain was attempting to sever the New England states from the Union.[39] The British Government denied any connection with the Henry mission; no evidence was produced to show that the New England states had contemplated any plan of secession; and the Federalists charged that the entire affair had been trumped up by Madison in order to augment the feeling for war, evidence being produced to show that the President had paid $50,000 for the papers.[40] Madison, however, was slow in taking advantage of the war passion he had thus aroused. Congress, now thoroughly in favor of war, fumed and fretted at the delay, but hesitated to act without a recommendation from the President. Finally, a delegation from Congress, headed by Clay, waited upon the President and declared the readiness of the majority in Congress to vote the war, _if recommended_.[41] Thereupon Madison sent a special message June 1, 1812, recommending war,[42] to which Congress responded by passing the declaration on June 18.

The significance of this is not so much in the apparent domination of the President by the majority element in Congress, as in the fact that Congress, even though fully convinced of the necessity for war and fully determined upon such action, yet _found itself_

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[39] For the Henry correspondence, see _Annals of Cong._, 12 Cong. I, 1162-1181; for Madison's message, Richardson, _op cit._, I, 498.

[40] Updyke, _Diplomacy of the War of 1812_, 126-127.

[41] _Writings of James Madison_, VIII, 192, n; Joseph Gale's account in _Am. Hist. Rev._ XIII, 309; cf. also accounts in Hildreth, _History of the United States_, VI, 298; Von Holst, _Constitutional and Political History of the United States_, I, 230; McMaster, _op. cit._, III, 448 -- all to the effect that Madison was promised a renomination if he would send Congress a war message.

[42] _Writings_, VIII, 192-200; Richardson, _op. cit._, I, 499-505.

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unwilling to act without first securing the recommendation of the President. Had the President been less hasty in passing judgment upon, and submitting to Congress, the Henry correspondence, the authenticity of which had at least not been thoroughly established; had he delayed his war message a little longer, the new conciliatory attitude of the British Government might have been met and the war of 1812 very likely altogether averted. These are the facts that John Adams probably had in mind when he wrote in 1815: "Mr. Madison's administration has proved great points, long disputed in Europe and America.

1. He has proved that an administration under our present Constitution can declare war.

2. That it can make peace. . ."[43]

President Polk came into office in 1845 with the avowed purpose of acquiring California and, later, also New Mexico. He tried first to secure them peacefully by purchase, and for that purpose sought an appropriation of a million dollars from Congress, concealing the real object under the euphemistic phrases of "effecting an adjustment of our differences with Mexico", and "the conclusion of a Treaty of boundary".[44] Failing in this, Polk, as early as February, 1846, declared himself in favor of "strong measures" against Mexico, and from that time was steadily determined on war.[45] The sending of a war message was postponed, however, partly because of the unsettled state of the negotiations with Great Britain over the Oregon question, but probably rather because Polk was seeking

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[43] Life and Works of John Adams, X, 167-168.

[44] McMaster, op. cit., VII, 432, 439; Reeves, American Diplomacy under Tyler and Polk, 272; Diary of James K. Polk, I, 34-35, 303, 306-308, 310-313, 317.

[45] Reeves, op. cit., 284, 287, 288, 294; Rhodes, Historical Essays, 211; Diary of James K. Polk, I, 233-234, 319, 337, 343.

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something that might serve as a plausible cause for war.

Certain sundry claims of American citizens upon Mexico had been a matter of difficulty and negotiation between the two governments since 1836,[46] and were still largely unsettled. The President now hit upon these claims as the "aggravated wrongs" which should be the basis for the complaints against Mexico,[47] although "many of the claims were exorbitant and some of them fraudulent".[48] Meanwhile, General Taylor had been sent to occupy the disputed territory beyond the Nueces River, had advanced to a position opposite Matamoras where a strong Mexican force was located, and Polk seemed to think there was some hope of a collision in the near future,[49] which would give him more satisfactory ground for his war message.

For some time, however, no hostilities occurred, the President became impatient of delay, and on May 9 the Cabinet agreed that a message recommending war should be prepared and submitted by the following Tuesday (May 12), whether the Mexican forces had committed any act of hostility against Taylor or not. Buchanan, the Secretary of State, had already drawn up a statement of the causes of complaint, the President had decided to substitute practically the precise language he himself had used in dealing with the Mexican claims in his annual message of the year before, when suddenly the situation was changed by the receipt of news that same evening from Taylor that the Mexicans had attacked and hostilities had begun. The Cabinet was immediately summoned again, and it was agreed that a message should be sent recommending "vigorous and prompt measures to enable the Executive to prosecute the war."[50]

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[46] Reeves, op. cit., 76, 86, 93, 96, 107-108.
[47] Diary of James K. Polk, I, 363, 377, 382.
[48] Reeves, op. cit., 86.
[49] Diary of James K. Polk, I, 380, (May 6, 1846).
[50] Ibid., 384-386.

Polk's opportunity had come. He recognized that "public excitement in and out of Congress was very naturally very great"; unlike Jefferson, he determined to play upon that feeling, so he spent Sunday in writing his message, and on Monday, May 11, it was submitted to Congress. There was now no mention of the long-unsettled claims as the "aggravated wrongs" borne by the United States; the entire emphasis was laid on the fact that the Mexicans had attacked American forces and shed American blood on American soil, and that since war had thus been begun by Mexico, the issue must be accepted and hostilities carried on with vigor.[51]

In spite of the fact that there had been, and still was, bitter opposition in Congress to a war with Mexico,[52] the President's message was quickly responded to. In two hours, of which time one and a half hours were occupied in reading the documents accompanying the President's message, the House of Representatives passed the bill reciting that war existed by act of Mexico and providing for the support of hostilities.[53] The Senate could not be hurried quite so rapidly, but by evening of the next day (May 12), it had also given its sanction; and the President's actions were sustained.

Whether or not Congress would have sustained the President and authorized hostilities, had not the news from Taylor changed the situation from an admitted war of aggression to an ostensible war of defense, it is impossible to say with any degree of certainty. Certainly, as Reeves suggests, "Taylor's skirmish with the Mexicans was an occurrence that saved Polk from a dangerous situation".[54]

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[51] Richardson, op. cit., IV, 437-443.

[52] A motion in the House of Representatives for a formal declaration of war was rejected by a large majority. Cong. Globe, 29 Cong., 1 Sess., 792, 794.

[53] Statement of Senator Benton, Diary of James K. Polk, I,392.

[54] Reeves, op. cit., 298.

Nevertheless, Polk had been able to so handle matters as to make an armed collision almost inevitable, and he took advantage of the excitement thus aroused to secure from an unwilling Congress a strong backing for his war policy. His actions, says Rhodes, "illustrate the power inherent in the executive office".[55] Certainly, but for the action of the President, the war would not have been sanctioned by Congress; because of the action of the President, the war was sanctioned, and the objects sought by the President were obtained.

Had President Grant been eager for war with Great Britain, a mere message and recommendation from him to that effect would undoubtedly have brought on such a conflict. The unanimous passage by the House of Representatives in 1866 of a bill modifying the neutrality laws in such a way as to permit the sale of war-ships and munitions to other powers;[56] the sympathy and support given to the Fenian movement against Canada; the resolution proposed in the Senate in 1867 for the recognition to Abyssinia during its war with Great Britain of the same rights which Great Britain had recognized to the Confederacy;[57] the action of the Senate in 1869 in rejecting by a vote of 54-1 the treaty providing for a joint high commission to pass upon the claims of subjects of either government against the other;[58] speeches such as that of Senator Sumner delivered during the consideration of the above-mentioned treaty;[59] the angry and excited discussion in the press of the two countries -- these various incidents showed that the bitter feeling aroused against Great

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[55] Historical Essays, 212.

[56] Cong. Globe, 39 Cong., 1 Sess., Pt. V, 4194, 4197. See Sec. 10, which was the addition. The debate on the bill shows that it was aimed particularly at Great Britain.

[57] Ibid., 40 Cong., 1 Sess., 810.

[58] Sen. Ex. Jour., XVII, 163.

[59] On April 13, 1869. Works of Charles Sumner, XIII, 53-93.

Britain during the Civil War had assumed hostile form;[60] that, as an eminent authority has expressed it, "in the opinion of the majority, the country had a just cause for war in the escape of the Alabama and the Florida".[61]

The President and his wise Secretary of State, Hamilton Fish, chose to disregard this sentiment of the country and of Congress for an unyielding and belligerent attitude towards Great Britain. On the other hand, the two points in the American case which had given especial offense to the British were allowed to recede into the background, if not conceded altogether,[62] negotiations were persistently carried on for the arbitration of the Alabama and Florida claims, and the peace was preserved.

President Cleveland, on the other hand, very nearly precipitated war with England, when in his special message of December 17, 1895,[63] he made his strong declaration with regard to the Venezuelan boundary situation. The President stated that arbitration had been declined by Great Britain, and proposed an independent inquiry and report by a strictly American commission. "When such report is made and accepted", he said, "it will, in my opinion, be the duty of the United States to resist by every means in its power, as a willful aggression upon its rights and interests, the appropriation by Great Britain of any lands or the exercise of any governmental jurisdiction over any territory which after investigation we have determined of right belongs to Venezuela".[64] Though the coun-

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[60] Cf. Dunning, Reconstruction: Political and Economic, 160-162.

[61] Rhodes, Historical Essays, 218-219.

[62] These were the claim that wrong had been done to the United States by the recognition of the Confederates as belligerents, and the demand for compensation for "national" or "indirect" losses. See Dunning, op. cit., 167.

[63] Richardson, op. cit., IX, 655-658.

[64] Ibid., 658.

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try had up to this time been ignorant of the peremptory demands of the administration, and the message threatening war came therefore as an unexpected shock;[65] though Congress and the President had heretofore quarreled over almost every question of consequence, Congress now sustained the President in his demands and passed almost without debate, the bill for the appointment of the commission asked for.[66]

It is not important in this connection whether or not the President had made a valid interpretation and a correct application of the Monroe Doctrine. The important thing to notice is that he had raised an issue which meant simply this, that if arbitration were refused by Great Britain, the United States would mark the boundaries of one of her colonies and compel the mother-country to accept the limits so prescribed; that a hostile Congress had accepted without question the issue so raised; and that the President had thereby placed the United States and Great Britain unexpectedly in a position where one or the other must openly recede from its announced intention, if a conflict was to be averted. A conflict was averted, but only by reason of England's conciliatory agreement to arbitrate; and it is worthy of note that, as one authority has expressed it, "only in the case where he (Cleveland) was led, by whatever influences, to offer a gross insult to Great Britain, such as would not have been borne for a moment by this country from any other without prompt resentment, did he receive the unanimous sup-

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[65] Dewey, National Problems, 308; Latané, From Isolation to Leadership, 49.

[66] Cong. Record, XXVIII, Pt. I, (54 Cong., 1 sess.), 234-235, 255-265; Dewey, op. cit., 310.

port of both houses."[67]

In the case of the difficulties with Spain over the Cuban question, it has been said that "Presidents Cleveland and McKinley kept the national legislature from a declaration of hostilities for more than two years before final action was taken."[68] It is true that the temper of Congress was for war long before the President was ready to recommend such a step; it is likewise undoubtedly true that the President might have delayed such recommendation still longer, and possibly -- almost certainly -- have averted war altogether.

Congress in 1890 had, by concurrent resolution, requested the President "to invite from time to time, as fit occasions may arise, negotiations with any government with which the United States has or may have diplomatic relations, to the end that any differences or disputes arising between the two governments which cannot be adjusted by diplomatic agency may be referred to arbitration, and be peaceably adjusted by such means".[69] In the spring of 1898 Spain had made several concessions, which, according to eminent authority, "fully covered" the expressed wishes of the United States for Cuba,[70] and on March 31, she proposed arbitration of the Main controversy.[71] General Woodford, the American minister to Spain, evidently did not consider the situation hopeless, for he wrote: "I know that the Queen and her present ministry sincerely desire peace upon as that common."[69]

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[67] Bradford, The Lesson of Popular Government, I, 358,n. Other authorities say that President Cleveland, in this instance, recommended "demands Great Britain could hardly regard as anything but unfriendly." Ogg & Beard, National Governments and the World War,102.

[68] Young, The New American Government and Its Work, 27.

[69] Yale Rev., IX, 402.

[70] For these concessions of March 30, March 31, and April 9, see For. Rel., 1898, 725, 762, 750; cf. also Benton, International Law and Diplomacy of the Spanish American War, 83-91.

[71] Benton, op. cit., 85.

In the case of the differences which are [illegible] [illegible] something, it was this [illegible] [illegible] [illegible] and the outcome, [illegible] — [illegible] [illegible] [illegible]

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[68] Beardsley, [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

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and that the Spanish people desire peace, and if you can still give me time and liberty of action I will get for you the peace you desire so much and for which you have labored so hard;"[72] and on April 10, in a personal appeal to the President: "I hope that nothing will now be done to humiliate Spain, as I am satisfied that the present Government is going, and is loyally ready to go, as fast and as far as it can."[73]

But neither the above-mentioned resolution of Congress, the overtures of Spain, the proffered mediation of the Powers,[74] nor the pleadings of the American minister, had any effect on the President. No reply was made to the offer of arbitration,[75] and on April 11, the message recommending war went to Congress, with the usual and natural response. The vital question, says Benton, is "whether the President did not yield prematurely and whether he had exhausted the resources of diplomacy;"[76] he answers that question by saying that in the opinion of nearly all writers on international law the particular form of intervention in 1898 was "unfortunate, irregular, precipitate, and unjust to Spain".[77]

The influence of President Wilson with regard to the events of the recent world war, and the readiness of Congress to follow his recommendations -- to be a "peace Congress" when the President desired peace, to be a "war Congress" when the President recommended war -- are too evident to require any extended comment. Al-

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[72] For. Rel. 1898, 732.

[73] Ibid., 747.

[74] On April 6 the Ambassadors of Great Britain, Germany, Austria, France, Italy, and Russia, united in a personal appeal to President McKinley for a peaceful adjustment. Two days later, even stronger representations were made at Madrid. Benton, op.cit., 89-90.

[75] President McKinley, in his message to Congress, dismissed this offer of arbitration with these laconic words: "I made no reply".

[76] Benton, op. cit., 95.

[77] Ibid., 108.

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[36] Ibid., [illegible]

[37] Ibid., [illegible]

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[40] Ibid., [illegible]

[41] Ibid., [illegible]

though basing his claim for re-election in 1916 largely on the ground that he had "kept us out of war", with the presumption that he would continue to do so in the future, and carrying with him a Congress presumably committed to the same policy; and although standing, as late as January, 1917, for "peace without victory",[78] President Wilson felt compelled by the turn of events to recommend war upon Germany in his address of April 2, a recommendation at once adopted by the "peace Congress" with very little opposition.[79]

Although the governments allied with Germany could with difficulty be distinguished in method and policy from the government of Germany -- the Austro-Hungarian government especially having openly avowed its endorsement of Germany's submarine policy, and its ambassador having been implicated in plots to destroy our factories --, the President was not at that time ready to make war upon any of them, because, as he said, "they have not made war upon us or challenged us to defend our right and our honor."[80] Congress therefore took no action towards declaring war against these countries.

However, by December of the same year, President Wilson had discovered that "one very embarrassing obstacle that stands in our way is that we are at war with Germany, but not with her allies." He therefore recommended a declaration of a state of war with Austria-Hungary, that nation being "not her own mistress, but simply the vassals of the German Government." The President admitted that the same logic would seem to demand a declaration of war also against Turkey and Bulgaria, since "they also are the tools of Germany", but he declined to recommend such action against these

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[78] See his address to the Senate, Jan. 22, 1917. McKinley, Collected Materials for the Study of the War (1st ed.), 9-11.

[79] Joint Resolution of Apr. 6, 1917. *Ibid.*, 137.

[80] Address to Congress, Apr. 2, 1917. *Ibid.*, 15.

countries, because "they are mere tools, and do not yet stand in the direct path of our necessary action."[81] In each case Congress followed the recommendation of the President without question, declaring war upon Austria-Hungary,[82] and, despite some feeling that Turkey and Bulgaria should have been included,[83] no declaration was ever made against those countries.[84]

These examples and incidents from the history of our own country illustrate clearly the very important position conceded to the President with regard to a declaration of war. They would seem to bear out the statement of one of our Congressmen, when he said in a recent speech: "History shows . . . that while Congress does possess that power (to declare war), in reality, the President exercises it. Congress has always declared war when the President desired war, and Congress has never attempted to declare war unless the President wanted war. That was true of the war of 1812. It was true of the Mexican war. It was true of the Spanish-American war. It was true of this war. It will probably be true of every war in which the nation engages so long as the present method of declaring war continues."[85]

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[81] Address to Congress, Dec. 4, 1917. N. Y. Times Current Hist. Mag., VII, 66-67 (Jan., 1918). For further reasons why Turkey and Bulgaria were omitted, see ibid., 74.

[82] Joint Resolution of Dec. 7, 1917. Ibid., 69

[83] Cf. attitude of Senator Lodge. Ibid., 75.

[84] Diplomatic relations were broken off with Turkey, Apr. 20, 1917, but the initiative had been taken by that country; with Bulgaria relations were not even severed during the entire course of the war.

[85] Congressman Dill, Cong. Record, 65 Cong., 3 Sess., (Jan. 21, 1919), 1824; see also an editorial in The Nation, Mar. 1, 1919; cf. Finley & Sanderson, The American Executive and Executive Methods, 280; Bryce, American Commonwealth, I, 54; Bradford, The Lesson of Popular Government, I, 359; Case, Constitutional History of the United States, 232-233; Young, The New American Government and Its Work, 27; Schouler, Constitutional Studies, 138.

The power of the President to recommend war and to communicate facts as a basis for such recommendation gives him also an opportunity to set forth the grounds and to explain the purposes of the nation in entering upon war. Since the ratification of the Hague Convention of 1907, such a statement of reasons is required before the beginning of hostilities. These are the terms of the article in question: "The Contracting Parties recognize that hostilities between them must not commence without a previous and unequivocal warning, which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war."[86] It would seem, from the language of the article, that the body in any country to which is entrusted the power of declaring the war was considered the proper body to specify the reasons for such declaration.

As a matter of fact, the uniform practice in the United States has been otherwise. Even before the adoption of the Hague Convention, the President, in his messages to Congress recommending war, has always stated what seemed to him to be the reasonable grounds for such action. There is no doubt that Congress, under its power to pass the declaration, might likewise have expressed its reasons,[87] which might agree with those of the President, or might differ, either wholly or in part. The President would be bound to accept or reject the declaration as passed by Congress, as a whole.[88]

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[86] Convention relative to the Commencement of Hostilities, Art. 1, Higgins, The Hague Peace Conferences, 198.

[87] "It may be said. . .that this power (of declaring war) naturally includes the right of judging whether the nation is or is not under obligations to make war. . . However true this position may be, it will not follow that the executive is in any case excluded from a similar right of judgment, in the execution of its own functions." Works of Alexander Hamilton, IV,142. "The power to judge of the causes of war, as involved in the power to declare war, is expressly vested, where all other legislative powers are vested, that is, in the congress of the United States." Writings of James Madison, VI, 154; cf. ibid., 153, 161.

[88] S. E. Baldwin, op. cit., Am.Jour.Int.Law, XII, 10.

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He could not accept the conclusion and disapprove of the grounds given for the action. Congress has, however, contented itself with a mere formal declaration of war or a formal recognition of a state of war as already existing, without adding any specific statement of reasons or objects. Long reports have been made in every case by the Foreign Relations committees of each house, justifying the action about to be taken, but in no case has the statement of reasons embodied in these reports been incorporated into the declaration itself, not even since the adoption of the Hague Convention. Congress, in thus refusing or neglecting to give a specific statement of its own, has apparently recognized the President as having the right and as being the most suitable authority to set forth to the world the grievances of the nation. At all events, the President, rather than Congress, is now regarded, both at home and abroad, as the spokesman of the nation with regard to the reasons and objects of a war, and his statements are generally accepted as committing the nation to the policies therein laid down.

The power of the President with regard to a declaration of war does not end with the functions of communication of information, and of recommendation. A declaration of war, like any other bill, order, resolution, or vote requiring the concurrence of both houses of Congress, must be submitted to the President for his approval or disapproval.[89] If it were possible to imagine Congress as passing a declaration of war without first being certain of the President's approval, or in direct opposition to his known views

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[89] Constitution, Art. I, Sec. 7, Cl. 2, 3. The declarations in the cases of the War of 1812, the Mexican War and the Spanish-American War were passed in the form of Acts of Congress; those against Germany and Austria-Hungary in the form of joint resolutions.

(as is often done with other measures), the President could exercise his power of veto and thus prevent the declaration from going into effect. Theoretically, Congress might in turn, by a two-thirds majority, declare war even against the wishes of the President.[90] Strictly speaking, it is true, as an eminent Senator has said, that "the President not only cannot declare war, and it is not only conferred in terms upon Congress, but even if the President should be opposed to a proposed war, two thirds of each Branch can declare war. It would not require his approval. There is the most important of all foreign relations. It does not belong to the President."[91] In practice, however, such a situation cannot be imagined. The successful prosecution of a war would be impossible without the hearty cooperation of that department of the government which has in its sphere the actual direction and management of the war. Consequently, though Congress technically has the power, it has chosen to follow rather than to lead with respect to a declaration of war. It always has sought, and it is safe to assume that it always will seek, to assure itself of the President's approval before passing or even proposing a declaration of war.[92]

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[90] See Schouler, Constitutional Studies, 137.

[91] Senator Bacon, Cong. Record, XL, Pt.3, (59 Cong., 1Sess.), 2132.

[92] "Certain it is that the war with France was begun that way, Congress following the lead of, and seeking knowledge from, the President at every step." Sen. Doc. No. 56, 54 Cong., 2 Sess., 17. A recent newspaper dispatch with regard to the Mexican situation is significant as illustrating the absolute subserviency of even a hostile Congress in such matters: "President Wilson is in complete control ofthe direction of American policy in dealing with Mexico. . . If President Wilson should indicate that Congress should adopt the Fall resolution requesting a severance of diplomatic relations with Mexico and withdrawal of recognition of Carranza, there would be little opposition to the passage of the measure. If, however, he should oppose such a step, the resolution will be modified to conform to his views or shelved." Chicago Tribune (Staff Correspondence), Dec. 8, 1919.

After the enactment and approval of a declaration of war, it becomes the right and duty of the President to give public notice of it to all neutral powers.[93] The Hague Convention of 1907 requires such notice to neutrals, without specifying by whom it is to be given.[94] The President, however, as the sole organ of communication with foreign powers, is the natural authority for the exercise of that function, and there has been no dispute as to his right or duty in that respect. The exercise of the function is of considerable importance, since by the article referred to a state of war is to be regarded as of no effect towards neutrals until they have received such notification,[95] and hence a delay or neglect in fulfilling the requirement of the Convention might affect the validity of captures at sea and other warlike operations involving neutral rights. The chief ends of such announcement to neutrals are, therefore, to give formal notice of the fact of the declaration and the time of its going into effect.

In addition to notifying neutrals, the President usually also gives official notice of the existence of a state of war to the citizens of this country. This he does by means of a public proclamation. Presidents Madison and Polk both issued such proclamations, merely announcing to the country that war existed by act of Congress and exhorting the people to exert themselves "in preserving order, in promoting concord, in maintaining the authority and the efficacy of the laws, and in supporting and invigorating all the measures which may be adopted by the constituted authori-

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[93] S. E. Baldwin, op. cit., Am. Jour. Int. Law, XII, 11.

[94] Convention relative to the Commencement of Hostilities, Art. 2., Higgins, op. cit., 199.

[95] Ibid.

ties for obtaining a speedy, a just, and an honorable peace."[96]

There does not appear to be any express constitutional or statutory authority for the issuance of such proclamations, though, if any were needed, it might be implied from the power to "take care that the laws be faithfully executed."[97] It may also be inferred from an act passed in 1798. This act provided, among other things, for the removal of enemy aliens "whenever there is declared a state of war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President makes public proclamation of the event." It further authorized the President, "in any such event, by his proclamation thereof, or other public act", to establish the necessary regulations for the conduct, restraint, residence, or removal of such aliens.[98] President Wilson, in his proclamation of April 6, 1917, announcing the state of war with Germany,[99] referred specifically to this section of the Revised Statutes for his authority, though he was probably referring rather to the authorization to proclaim alien enemy regulations than to the mere announcement of a state of war. President McKinley issued several proclamations after the declaration of war against Spain, but none announcing the existence of a state of war. It was probably thought unnecessary since the war had already been going on

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[96] Richardson, op. cit., I, 512; IV, 470.

[97] Constitution, Art. II, Sec. 3.

[98] Act of July 6, 1798, Annals of Cong., 5 Cong., III, App., 3753. See also U. S. Rev. Stats., sec. 4067.

[99] Text in McKinley, Collected Materials for the Study of the War, 169.

for several days before the retroactive declaration was adopted.[100] The President can hardly be said to be under any obligation to issue such a proclamation, since the passage of the declaration should be sufficient notice to the country of the existence of a state of war. He has generally deemed it wise to do so, however, and there can be no question of his power in that respect, even without express authority. The statute mentioned may be said to confer the authority by implication, and, indeed seems to expect from the President that action.

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[100] The joint resolution authorizing the President to use the armed forces in compelling Spain's withdrawal from Cuba was passed April 20, hostile measures were taken at once, and the formal declaration, passed April 25, declared the war to have existed since the 21st.

II. MILITARY POWERS IN TIME OF WAR.

Chapter VI.

Power to Raise and Organize the Armed Forces.

It has come to be an axiom in public law that the power to raise and support the armed forces of a democratic state should be confided exclusively to the popular branch of the government.[1] The Constitution of the United States accordingly gives to Congress the power "to raise and support armies", and "to provide and maintain a navy".[2] Raising armies includes such matters as the determination of the number of men to be enlisted; their enlistment qualifications; their organization into the different arms of the service; the number and arrangement of the various units; the number and rank of officers; the term of service for officers and men. Providing a navy includes the determination of the same class of subjects relating to the seamen and naval officers; the number, size, character, and cost of vessels of war, navy and dock yards, and other similar matters.[3]

Over all these matters the power of Congress is complete and exclusive. The President is vested with no constitutional power in regard to the raising and organization of the armed forces. He derives none from his position before international law. Hence such powers as he does possess in this respect must rest wholly upon the authority of custom and statute. Congress in this field is supreme, but Congress has from the first recognized the wisdom and necessity of entrusting the President with some statutory authority, which has at times amounted to the exercise of a considerable discretionary power.

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[1] Pomeroy, Constitutional Law (Bennett's ed.), 382.
[2] Art. I, Sec. 8, Cl. 12, 13.
[3] Pomeroy, op. cit., 383.

The common method of raising armies under ordinary circumstances -- that of voluntary enlistment -- has generally been exercised in peace time in accordance with detailed statutes, leaving to the President little or no real power. Congress is ordinarily careful to prescribe definitely the number of men to be enlisted, their enlistment qualifications, the term of their service, and other details, merely authorizing the President "to accept", "to call for", "to call for and accept", or "to employ", within these well-defined limits. Occasionally the statutes have prescribed only the maximum number of men to be raised, giving to the President some little discretion in determining upon the size of the forces within that number. Likewise when providing for the navy, the statutes generally prescribe in detail the number and kind of ships to be constructed, contracted for, or purchased, the cost and details of equipment and armament, and other corresponding matters, leaving to the President only the duty to see that the provisions of the statutes are carried out.

In times of war or emergency, however, and occasionally even in peace time, the President has been vested with more or less discretion in these matters. Thus the foundation of the army under the Constitution had scarcely been laid,[4] when by the Act of March 3, 1791, which added another regiment to the regular forces, the President was given power, "if of opinion that it will be conducive to the public service", to employ "levies" (volunteers) in addition to the number of 2000, for six months, as a supplementary force,

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[4] By the Act of Sept. 29, 1789, the army existing under the Confederation was "recognized to be the establishment for the troops in the service of the United States"; and by the Act of Apr. 30, 1790, the beginning was made of a permanent military establishment. Annals of Cong., 1 Cong., II, App., 2199, 2222.

obviously to be used only for emergency purposes.[5] An act of the next year (March 5, 1792), passed as a result of St. Clair's defeat by the Indians, provided three additional regiments for the protection of the frontier to be enlisted for three years, but gave the President the power "to forbear to raise, or to discharge after they shall be raised," the whole or any part of these forces, "in case events shall, in his judgment, render his so doing consistent with the public safety." The President was further authorized to call into service "for such period as he may deem requisite, such number of cavalry as, in his judgment, may be necessary for the protection of the frontiers;" and also to employ "such number of Indians as he may think proper . . . in case he shall deem the measure expedient."[6]

The crisis with France resulted also in the granting of considerable discretionary power to the President. The Act of May 28, 1798, authorized the President to raise a Provisional Army of 10,000 men, "in the event of a declaration of war against the United States, or of actual invasion of their territory by a foreign Power, or of our imminent danger of such invasion, discovered, in his opinion, to exist, before the next session of Congress"; and also to create a sort of reserve force by accepting, "if in his opinion the public service shall require", volunteers liable to service at any time within two years.[7] Other acts during the same period likewise vested the President with some discretionary power, such as to prescribe the enlistment qualifications for the forces provided and

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[5] Annals of Cong., 1 Cong., II, App., 2350.
[6] Ibid., 2 Cong., App., 1343, (Secs. 11, 13, 14).
[7] Ibid., 5 Cong., III, App., 3729, (Secs. 1, 3). It was under authority of this act that Washington was appointed Lieutenant-General and Commander-in-Chief of the forces to be raised for the expected war with France.

to discharge the troops at his discretion.[8]

The Acts of February 24, 1807 and February 6, 1812, passed in anticipation of trouble with England, each again provided a sort of reserve force, of 30,000 and 50,000 men, respectively, to be liable for duty *at any time the President might deem proper*, within two years from the date of their acceptance into the service;[9] while another act passed during the war (Act of January 29, 1813) authorized the raising of such a force "as in the opinion of the President may be necessary for the public service", up to twenty additional regiments.[10]

During the Mexican War very little real discretionary authority was granted to the President in the matter of raising the necessary forces, although the Act of May 13, 1846, recognizing a state of war, empowered him to employ the militia, naval, and military forces, and "to call for and accept" up to 50,000 volunteers; while another act of the same date authorized him to increase the companies in the regular army to 100, to be reduced again to 64 when the exigency should cease.[11]

The earliest acts for the raising of volunteers and for the increase of the regular army during the Civil War were similar in character, the President being authorized to accept volunteers, "in such numbers as the exigencies of the public service may, *in his opinion*, demand", up to 500,000 for three years or the duration of the war; and to increase the regular army by 11 regiments, such increase to be only for the period of the emergency.[12] The Act of

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[8] Acts of July 16, 1798 and Mar. 2, 1799. *Annals of Cong.*, 5 Cong., III, App., 3785, 3933.

[9] *Ibid.*, 9 Cong., 2 Sess., App.,1259;*ibid.*,12 Cong.,II,App,2235.

[10] *Ibid.*, 12 Cong., 2 Sess., App., 1322-1325.

[11] *9 Stat. at L.*, 9, 11.

[12] Acts of July 22,July 25,& July 29,1861.12 *Stat.at L.*,268,274, 279.

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July 17, 1862, however, vested the President with somewhat larger powers, in that, besides authorizing him to accept an additional 100,000 volunteers for nine months, it empowered him to accept volunteers as replacements, "in such numbers as may be presented for that purpose"; and also to employ persons of African descent, without limit as to number, for any labor, or military or naval service, for which they might be found competent.[13] Considerable power was also given with regard to increasing the navy by an act which authorized the Secretary of the Navy to hire, purchase, or contract for such vessels "as may be necessary".[14]

The most sweeping grant of power with regard to the raising of forces by voluntary enlistment came during the Spanish-American War, when no limit was placed on the numbers the President might call for in that way. Both the Joint Resolution of April 20, presenting the ultimatum to Spain, and the Act of April 25, formally declaring war, empowered the President, in identical language, "to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions (and this Act) into effect."[15] The Act of April 22, 1898, authorizing the Volunteer Army, apparently contemplated some legal limit, as it provided that when necessary to raise a volunteer army, "the President shall issue his proclamation stating the number of men desired, within such limits as may be fixed by law."[16] With the exception of provisions regarding special organizations,[17] no limit

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[13] 12 Stat. at L., 597 (Secs. 3, 4, 12).
[14] Act of July 24, 1861. *Ibid.*, 272.
[15] 30 Stat. at L., 364, 738.
[16] *Ibid.*, 361 (Sec. 5).
[17] *Ibid.*, (Sec. 6); see also Act of May 11, 1898. *Ibid.*, 405.

to the number of troops to be raised was ever made. Under the provisions of this act, President McKinley issued two proclamations, one on April 23, calling for 125,000 volunteers, and the other on May 25, calling for 75,000.[18]

During the recent war with Germany, the principle of raising troops by voluntary enlistment was almost entirely abandoned, although the President was at the beginning of the war empowered in that way to raise the increments of the Regular Army provided for by the National Defense Act of 1916, to recruit all Regular Army oganizations to their maximum strength, and to raise and maintain at his discretion four infantry divisions.[19]

Though considerable power has thus on many occasions been granted to the President to raise forces by the process of voluntary enlistment, the adoption of conscription has carried with it a still larger grant of power and a wider range of discretion. There is no longer any doubt as to the constitutional right of Congress to provide for the raising of armed forces by conscription as well as by voluntary enlistment,[20] and this method has been used,

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[18] Richardson, Messages and Papers of the Presidents, X, 203-204, 205-206.

[19] Selective Service Act of May 18, 1917. The authorization of the volunteer infantry divisions was in response to the offer of ex-President Roosevelt to raise this number of troops from the country at large. President Wilson declined to exercise the authority granted him under this provision.

[20] Arver v. U. S., 245 U. S., 366 (1918), in Wigmore, Source-Book of Military Law and War-Time Legislation, 617-626. The general understanding that the Constitution contemplated and permitted conscription was indicated by the following amendment proposed by the Rhode Island ratifying convention, May 29, 1790: "That no person shall be compelled to do military duty otherwise than by voluntary enlistment, except in cases of general invasion; anything in the second paragraph of the sixth article of the Constitution, or any law made under the Constitution, to the contrary notwithstanding." Elliot's Debates, I, 336. The arguments for and against conscription are well summed up in Pomeroy, Constitutional Law, 391-392.

less commonly than the other, but on occasions of greater emergency.

Conscription was recommended by Congress, and used to some extent by the states during the Revolution,[21] and was first proposed under the Constitution in 1814. Other methods having failed to bring forth the required number of troops, Secretary of War Monroe, in a report submitted October 17, suggested to Congress several alternative plans of raising men by draft.[22] Some sort of conscription measure would undoubtedly have been adopted, had not its necessity been obviated by the termination of the war.

The Enrollment Act of March 3, 1863, is notable as being the first instance of resort to conscription in the United States under the Constitution. This act constituted all able-bodied male citizens and declarants between the ages of 20 and 45 into the "national forces", made certain classifications, divided the country into enrollment districts, and empowered the President to assign to each district the quota of men to be furnished and to call forth these "national forces" by draft.[23] Amendments added in 1864 made it clear that the President's power to call for men by this means was to be practically unlimited, he being authorized, "whenever he shall deem it necessary, during the present war, to call for such number of men for the military service of the United States as the public exigencies may require"; and further, at his discretion, to call for volunteers for one, two, or three years, deficiencies in quotas to be filled by draft.[24]

Under the provisions of these acts, President Lincoln issued five separate calls for men -- by proclamation of October 17,

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[21] Upton, Military Policy of the United States, 27-28, 29, 35-36, 42.
[22] Am. State Papers, Mil. Affairs, I, 514-517.
[23] 12 Stat. at L., 731.
[24] Acts of Feb. 24 and July 24, 1864. 13 Stat. at L., 6, 390.

1863, a call for 300,000 volunteers for three years or the war, to serve as replacements for those whose term of service expired during the year, and any deficiencies in the quotas of any state to be made up by draft on January 5, 1864; by executive order of February 1, 1864, a draft for 500,000 for three years or the war, with deductions for men furnished under the call of October 17, and therefore in reality a call for only 200,000; by executive order of March 14, 1864, an additional draft for 200,000 to supply a force for the Navy and an adequate reserve; by proclamation of July 18, 1864, a call for 500,000 volunteers, deficiencies to be filled by draft on September 5; and by proclamation of December 19, 1864, a call for 300,000 volunteers for one, two, or three years, to supply deficiencies and to provide for casualties.[25]

The Spanish War was fought principally with volunteers, but it has already been noted that the President was given practically unlimited power with respect to the raising of those.[26] The threatening situation that had been developed by the great European War led, however, to the passage in 1916 of the so-called National Defense Act,[27] into which was incorporated to a certain extent the principle of conscription, in that the President was empowered, among other things, to draft the National Guard and the National Guard Reserve created by that act, into the federal service, whenever Congress should authorize the use of armed forces for any purpose requiring troops in excess of the Regular Army.

This act increased considerably the President's powers to

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[25] Richardson, Messages and Papers of the President, VI, 169, 226-227, 232, 235, 271-272.

[26] Supra., 111.

[27] Public No. 85, 64 Cong., in Wigmore, Source-Book of Military Law and War-Time Legislation, 384-444.

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use the militia forces at his discretion, since the troops so "federalized" were by that action automatically discharged from the militia and taken over bodily into the national forces, and might therefore be used, not merely as militia, but for any purpose for which the regular military and naval forces might be used.[28] Under the provisions of this act, the National Guard was "federalized" and drafted by the President into the service of the United States during the Mexican border troubles of 1916, and at the beginning of the war with Germany in 1917.[29]

Finally, the principle of conscription was adopted in the Selective Service Act of May 18, 1917,[30] as the one means for raising the immense number of men required in the war with Germany, and the President was vested with wide powers in connection therewith. He was authorized to draft into the service of the United States the various National Guard organizations, in accordance with the National Defense Act of 1916; to raise immediately by draft 500,000 men in addition to the Regular Army and the National Guard; to raise and begin training, "in his discretion and at such time as he may determine", an additional 500,000; and to raise by draft such additional units "as he may deem necessary" for the maintenance of the above forces at the maximum strength.

Though an army of nearly 2,000,000 men was thus provided

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[28] It was under the provision of this act that the President was enabled to send the National Guard organizations overseas during the recent war, practically intact, and thus add in short order an immense number of already organized and at least partly trained men to the fighting forces.

[29] N. Y. Times Current Hist. Mag., IV, 617; see proclamation of July 3, 1917, U. S. Stats., 65 Cong., 1 Sess., Procs., 37.

[30] Public No. 12, 65 Cong., in Wigmore, op. cit., 460-468. This act was amended at various times -- Apr. 20, May 16, May 20, & Aug. 31, 1918. Ibid., 469-474.

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for, President Wilson was not satisfied with the powers granted and on May 2, 1918, through Secretary Baker, he requested Congress to remove all limit on the number of men that might be drafted for military service and to give him authority to summon as many as he might find necessary.[31] Congress acceded to this request, and in the Army Appropriations Act of July 9, 1918,[32] extended the authority of the President "so as to authorize him during each fiscal year to raise by draft . . . the maximum number of men which may be organized, equipped, trained, and used during each year for the prosecution of the present war until the same shall have been brought to a successful conclusion."

The President has thus from the very earliest period of our national history exercised a considerable power in connection with the raising of armed forces, a power that has been increased with the needs of the emergency, but a power based generally on definite statutory authority. It is beyond dispute that without such authority the President has no right to raise armies or provide for the navy. Nevertheless, there have been occasions when such power has been exercised without any legal sanction. Thus, during the Seminole War of 1818, the military commanders (Generals Gaines and Jackson) took the responsibility of raising and organizing a force of volunteers and Indians without statutory authority, and of formally mustering them into the service of the United States. General Jackson, on taking command, had been ordered by the War Department to call on the Executives of adjoining states for such additional militia as might be required for the termination of the war, but instead he levied an army from the people of Tennessee and

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[31] N. Y. Times, May 3, 1918.
[32] Public No. 193, 65 Cong., in Wigmore, op. cit., 587,600.

Kentucky by private circular letters, accepted the services of two regiments of volunteers as well as a considerable body of friendly Indians, organized and officered them on his own authority, and placed at their disposition United States funds under his control. Altogether he was reported to have raised an army of about 2500 men, appointed 230 officers, and established rank from an Indian brigadier-general down to the lowest subaltern of a company.[33]

Jackson's action was vigorously condemned in reports by both Senate and House committees, as a violation of the Constitution and a dangerous infringement on the powers of Congress.[34] Jackson defended his action with equal vigor, claiming that he had been in effect charged with the management of the war and vested with the powers necessary to carry it to a "speedy and successful" termination; that the call for volunteers was absolutely necessary to avoid delay and disaster; and that "every measure touching the raising and organizing this volunteer corps was regularly communicated to the Secretary of War, and received his unqualified approbation".[35] The records appear to sustain Jackson's contention. Secretary of War Calhoun, in reply to Jackson's announcement of what he had done, expressed to him the "entire approbation of the President of all the measures which you have adopted to terminate the rupture with the Indians."[36] Responsibility for the violation of the Constitution must therefore rest finally in this instance with the Executive.

In 1845 occurred another instance of this exercise of

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[33] Am. State Papers, Mil. Affairs, I, 740; II, 99-100.

[34] See report of the Senate committee, Feb. 24, 1819; of the House committee, Feb. 28, 1820. Ibid., I, 739-741; II, 101.

[35] Ibid., I, 755, 758.

[36] See letters of Jackson to Calhoun, Jan. 12 & Jan. 20, 1818; and of Calhoun to Jackson, Jan. 29 & Feb. 6, 1818. Ibid., I, 696-697, 743-744.

power without statutory authority. Anticipating war with Mexico, the Adjutant General, by direction of the Secretary of War, wrote General Taylor on August 6, directing him to learn from the authorities of Texas what additional forces could, in case of need, be placed at his disposal, and giving him authority to call them into service. "Such auxiliary volunteer force from Texas, when events, not now revealed, may justify their employment, *will be organized and mustered under your orders*, and be received into the service of the United States when actually required in the field to repel invasion, actual or menaced, and not before."[37] This order to Taylor was entirely without authority of statute, though it was expected that provision would be made to cover the case.

President Lincoln, immediately after the outbreak of the Civil War, took it upon himself to raise a great army without awaiting the sanction of Congress. By proclamation of May 3, 1861, based on no authority except the "existing exigencies" and his own position "as President and Commander-in-Chief", he ordered the increase of the Regular Army by 22,714 officers and men and of the Navy by 18,000 seamen, and in addition called for 42,034 volunteers to serve for three years -- an aggregate increase in the armed forces of 82,748 officers and men.[38] By the time of the special session of Congress, beginning July 4, the response to these calls had brought forth a total of 220,000 men accepted for service -- besides 80,000 militia for three months -- *without any constitutional or statutory authority*.[39] The President further, without authority

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[37] House Ex. Doc. No. 60, 30 Cong., 1 Sess., 83,84, quoted in Upton, *Military Policy of the United States*, 195-196.

[38] Richardson, *op. cit.*, VI, 15-16. See also Lincoln's executive order of May 7, 1861. *Ibid.*, 18-19.

[39] Upton, *Military Policy of the United States*, 230.

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of law, ordered a total of 19 vessels added to the Navy, and directed the Secretary of the Treasury to advance, without security, $2,000,000 to private individuals, to be used in meeting requisitions made necessary by these military and naval measures.[40]

Rhodes characterized these acts of the President as "clearly beyond the President's authority",[41] and Upton says of them that "No usurpation could have been more complete."[42] The President himself recognized and admitted that he had acted beyond his constitutional or statutory powers, but justified himself on the grounds of necessity, saying to Congress in his message of July 4, 1861: "These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress."[43] To this Congress responded by the Act of August 6, 1861, legalizing all the acts, proclamations, and orders of the President after March 4, 1861, respecting the Army and Navy and calling out militia and volunteers, "as if they had been issued and done under the previous and express authority and direction of the Congress of the United States."[44]

It is not within the scope of this study to speculate upon the question whether, in these instances of unauthorized exercise of power, the President was justified by the necessities in each case. It is sufficient to note that, when he considers the emergency serious enough, the President has acted, and presumably

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[40] Richardson, *op. cit.*, VI, 78. The individuals were John A. Dix, George Opdyke, and Richard H. Blatchford.

[41] *History of the United States*, III, 395.

[42] *Military Policy of the United States*, 229.

[43] Richardson, *op. cit.*, VI, 24. See also Lincoln's statement in his message of May 26, 1862. *Ibid.*, 78.

[44] 12 *Stat. at L.*, 326 (Sec. 3).

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will again act, as he thinks the situation demands, and trust to Congress to grant him the proper legal sanction afterwards. If these steps appear necessary to save the government, as they were said by Lincoln to be necessary in 1861, popular opinion will undoubtedly sustain the President, as it did then.

In the matter of the organization of the armed forces, the statutes have generally been careful to provide the details, but the President has frequently been granted considerable power in this respect also, especially in time of war or public emergency. The Act of March 3, 1791, authorizing the President to employ emergency "levies" at his discretion, empowered him also "to organize the said levies", apparently as he should see fit;[45] while the Act of March 5, 1792, prescribed in detail the organization of the enlarged army, but with the distinct proviso, "That it shall be lawful for the President of the United States to organize the five regiments of infantry and the said corps of horse and artillery as he shall judge expedient, diminishing the number of corps, or taking from one corps and adding to another, as shall appear to him proper."[46]

Under the authority of this act, President Washington, on Decmeber 27, 1792, announced to Congress that the Legionary plan of organization had been adopted for the troops, the whole force of about 5,000 men being given the name of the Legion of the United States, and divided into four Sub-Legions, each with its staff and more detailed division into dragoons, artillery, infantry, and riflemen.[47] The plan so adopted continued under executive authority un-

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[45] Annals of Cong., 1 Cong., II, App., 2350 (Sec. 9).
[46] Ibid., 2 Cong., App., 1343 (Sec. 2).
[47] Am. State Papers, Mil. Affairs, I, 40-41.

til 1795, when it was given definite statutory recognition, the Sub-Legions still to be organized, however, "in such manner as the President of the United States shall direct."[48]

The Provisional Army provided for the expected war with France was to be organized by the President into corps of artillery, cavalry, and infantry, "as the exigencies of the service may require";[49] the largest portion of the troops provided in view of the threatening relations with England was to be organized by him into battalions, squadrons, regiments, brigades, and divisions, as expedient;[50] while the forces raised particularly for the protection of the frontier were to be armed, equipped, and organized "in such manner . . . as the nature of the service, in his opinion, may make necessary."[51]

The organization of the forces raised for the prosecution of the Mexican War was prescribed in considerable detail in the statutes, leaving to the President very little discretionary authority. The same was true of those authorized during the Civil War, except that the Act of July 17, 1862, empowered the President to establish and organize *army corps* according to his discretion.[52] The organization of the forces raised by the proclamation of May 3, 1861, was, however, undertaken by the President *without authority*, as was the actual levying, and it was done in a most extraordinary manner, in that it was entrusted by the President to the Secretary

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[48] Act of Mar. 3, 1795. *Annals of Cong.*, 3 Cong., App., 1515, (Sec. 3).

[49] Act of May 28, 1798. *Ibid.*, 5 Cong., III, App. 3729, (Sec. 2).

[50] Acts of Feb. 24, 1807 & Feb. 6, 1812. *Annals of Cong.*, 9 Cong., 2 Sess., App., 1259 (Sec. 3); 12 Cong., II, App., 2235 (Sec. 3).

[51] Act of Jan. 2, 1812. *Ibid.*, 12 Cong., II, App., 2228 (Sec.1).

[52] 12 *Stat. at L.*, 597 (Sec. 9). For an example of how President Lincoln organized the Army of the Potomac under this provision, see his General War Order No. 2, Mar.8,1862. *Works of Abraham Lincoln (Federal ed.)*, V, 443-444.

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of the Treasury instead of to the Secretary of War.[53] Secretary Chase was to be assissted by a board of three army officers (Colonel Thomas, the Adjutant General, Major McDowell, the Assistant Adjutant General, and Captain Franklin, of the Topographical Engineers), who were free to make propositions, although their acceptance or rejection rested wholly with the Secretary of the Treasury. The scheme of organization agreed upon by this board and accepted by Secretary Chase was adopted by the War Department and published to the army in General Orders,[54] later being incorporated by Congress into statute.[55]

For the Spanish War, the Act of April 22, 1898, although prescribing rather fully the organization of the volunteers into brigades and divisions, again authorized the President to organize the army corps.[56] In the National Defense Act of 1916, the organization was likewise carefully prescribed up to and including brigades and divisions, but the President was empowered, "in time of actual or threatened hostilities, or when in his opinion the interests of the public service demand it", to organize the forces into "such army corps or armies as may be necessary", with the further provision that "nothing herein contained . . . shall prevent the President from increasing or decreasing the number of organizations prescribed for the typical brigades, divisions, and army corps,

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[53] "The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation." U. S. v. Eliason, 16 Pet., 291, 302 (1842).

[54] Nos. 15 & 16, May 4, 1861. See also Special Order No. 218, A. G. O., Sept. 2, 1862, by which President Lincoln ordered all the clerks and employees of the departments in Washington to be organized into companies and supplied with arms and ammunition, "for the defense of the capital." Richardson, op. cit., VI, 122.

[55] See Upton, Military Policy of the United States, 233-235; Acts of July 22, 25 & 29, 1861. 12 Stat. at L., 268, 274, 279.

[56] 30 Stat. at L., 362 (Sec. 9).

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or from prescribing new and different organizations and personnel as the efficiency of the service may require."[57]

This blanket authority was continued in almost identical language in the Selective Service Act of 1917,[58] and made it possible for the President, upon the advice of the General Staff, to so adjust the organization of the army and to add such new units as the character of the war showed to be necessary. It was under this authority, for example, that all distinctive appellations as Regular Army, National Guard, and National Army, were discontinued, and all the land forces merged into one United States Army.[59] It was likewise under this authority that such an organization as the Students' Army Training Corps was added to the military forces;[60] that new services were added, such as the Motor Transport Corps, Chemical Warfare Service, Air Service, and Tank Corps; and that the new plan of organization for the army, as recently announced by General March, was put into effect without any further action on the part of Congress.[61]

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[57] Sec. 3, Wigmore, *op. cit.*, 385.

[58] Sec. 1, *Ibid.*, 461.

[59] See Summary of Annual Report of Adjutant General of the Army, in *Official U. S. Bulletin*, Jan. 8, 1919. The Selective Service Act provided that the National Guard organizations drafted into the federal service should retain their State designations, "as far as practicable."

[60] See *Official U. S. Bulletin*, Oct. 1, 1918.

[61] *Ibid.*, Mar. 29, 1919. The new Navy reorganization -- that of maintaining two separate major fleets instead of only one -- was likewise announced as going into effect June 30, 1919. *N. Y. Times Current Hist. Mag.*, X, 253 (Aug. 1919).

Chapter VII.

Powers of Command.

The Constitution makes the President the commander-in-chief of the army and navy of the United States and of the state militia when called into the actual service of the United States.[1] Under this provision the President is vested with a function than which, according to an eminent authority, there is none "more significant as indicating his independent and exalted position."[2]

Strangely enough, in spite of this extraordinary grant of power, this clause of the Constitution appears to have aroused very little discussion and scarcely any serious opposition in the Convention of 1787. Some objections were evidently made, but rather to the idea of the President's assuming active command in the field than to his exercise of the general powers of command.[3] The members of the Convention probably had not forgotten the trouble and embarrassment caused during the Revolution by Congressional interference and the lack of a centralized control over the army. They were very likely influenced also by the precedents in the practice of European states, in former plans of union for the colonies, and in the recently established state constitutions. As students of political theory they were also undoubtedly impressed with the notion that the inherent nature of the executive office made it the

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[1] Art. II, Sec. 2, Cl. 1.

[2] McClain, Constitutional Law in the United States, 210.

[3] See Luther Martin's letter to the Maryland legislature. Elliott's Debates, I, 378; Farrand's Records, III, 217-218.

proper repository for the chief command of the military and naval forces.[4]

There was more discussion and more opposition in the state ratifying conventions. Thus Mr. Miller, in the North Carolina convention, expressed himself as fearful that the influence of the President, particularly over the military, would be too great, that he was given extensive powers too easily liable of abuse. "He considered it as a defect in the Constitution, that it was not expressly provided that Congress should have the direction of the motions of the army."[5] On the whole, however, the propriety of such a power in the President, so far as to give orders and exercise a general supervision over military and naval movements, was not seriously questioned even in the state conventions, the opposition again being largely to the possibility of the President's assumption of personal command of the forces.[6]

The general feeling throughout the country was undoubtedly expressed by Hamilton when he wrote: "The propriety of this provision is so evident in itself, and so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council, have for the most part concentrated the military authority in him alone. Of all

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[4] This idea was expressed quite recently by Senator Bacon as follows: "I want to give my idea as to why the constitution vests in the President the office of commander in chief. The President is an Executive. Upon him devolves the execution of the law and the enforcement of the law; and the enforcement of the law must necessarily be, in its last analysis, through the military arm. Of course the President can not be the Supreme Executive unless he has the supreme command of that through which the execution of the law must be enforced." _Cong. Record_, XLIII, Pt. 3, (60 Cong., 2 Sess.), 2542-2543.

[5] _Elliot's Debates_, IV, 114.

[6] Story, _Commentaries on the Constitution_, II, 315; cf. remarks of Patrick Henry. _Elliot's Debates_, III, 58-60.

the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of executive authority."[7]

Although there has been some contention that Congress, by virtue of its power to declare war and to provide for the support of the armed forces, is a superior body, and that the President, as commander-in-chief, is "but the Executive arm, . . in every detail and particular, subject to the commands of the lawmaking power,"[8] practically all authorities agree that the President, as commander-in-chief, occupies an entirely independent position, having powers that are exclusively his, subject to no restriction or control by either the legislative or judicial departments.[9]

The line of demarcation between the war powers of the President and those of Congress is not clearly drawn in the Constitution,[10] nor are the President's powers as Commander-in-Chief specifically described or defined by that instrument. Hence authorities in general hold that the President as commander-in-chief may

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[7] The Federalist, No. 73 (74), (Goldwin Smith ed., p. 409); cf. also reply of Mr. Spaight to Mr. Miller. Elliot's Debates, IV, 114-115.

[8] Senator Bacon in U. S. Senate, Feb. 6, 1906. Cong. Record, XL, Pt. 3, (59 Cong., 1 Sess.), 2135. On a later occasion, Senator Spooner replied very aptly to a similar suggestion, that such a construction would mean that "the Constitution did not constitute the President Commander-in-Chief of the Army and Navy, but constituted him the Adjutant-General of the Congress." Cong. Record, XLI, Pt. 2 (59 Cong., 2 Sess.), 1131.

[9] Pomeroy, Constitutional Law (Bennett's ed.), 71; Davis, Treatise on the Military Law of the United States, 323; Mississippi v. Johnson, 4 Wall., 475, 497 (1869); Ogg & Beard, National Governments and the World War, 100-101; Secretary Seward in letter to Lord Lyons, 1861, quoted in Watson, On the Constitution, II, 917; J. W. Garner, in Rev. de Droit Pub. et de la Sci. Pol., XXXV, 10.

[10] It was attempted by the Supreme Court in Ex parte Milligan, 4 Wall., 2, 139 (1866); see supra, 11.

constitutionally do what any military commander may do in accordance with the usual practice of carrying on war among civilized nations; that he must be guided in the exercise of such powers wholly by his own judgment and discretion, subject to his general responsibility under the Constitution.[11] According to the Supreme Court, the extent of these powers must be determined "by their nature and by the principles of our institutions."[12] For a closer definition we must therefore look to the law and usage of the military service, to international law and custom, and to the general practice under the Constitution and statutes of the United States.[13]

From these sources we find that the first great power of the President as commander-in-chief of the armed forces in time of war is the general direction of the military and naval operations. It is the President who wages war. Congress declares war and provides the means for carrying it on, but the President decides how the war is to be conducted and directs the campaigns. This is "a despotic power", says Burgess,[14] but nevertheless must be confided by a sound political science to the President. "The President must have despotic power when he wages war. The safety, the life perhaps, of the state requires it." Other authorities also hold that in the field of military operations there are no limitations prescribed by the Constitution and the President's power is therefore exclusive. Thus Lieber says that the direction of military movements "belongs to command, and neither the power of Congress to raise and support armies, nor the power to make rules for the government and

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[11] Finley & Sanderson, The American Executive and Executive Methods.267; Whiting, War Powers under the Constitution, 82-83.

[12] Ex parte Milligan, 4 Wall., 2, 139-140 (1866).

[13] Cf. J. W. Garner, in Rev. de Droit Pub. et de la Sci. Pol., XXXV, 13 (Jan-Mar., 1918).

[14] Political Science and Comparative Constitutional Law, II, 261.

regulation of the land and naval forces, nor the power to declare war, gives it the command of the army. Here the constitutional power of the President as commander-in-chief is exclusive."[15]

It is an interesting question whether the President, under this exclusive power, may assume active, personal command of the army and navy, in time of war. Authorities do not all agree on this point. Some claim that the President is essentially a civil officer and that it is not intended that he shall take active command in time of hostilities;[16] others say outright that the President "has all the powers of personal command";[17] while still others express themselves as doubtful. Thus Watson thinks it by no means certain that the President has such power, since if he should undertake to command the military and naval forces in time of war, he would necessarily be prevented from executing other important duties required of him by the Constitution. Watson admits, however, that if the President insisted on assuming personal command of the forces, it would be difficult and probably impossible to restrain him.[18]

While the expediency of such action on the part of the President may be doubted, there does not seem to be any ground for questioning his power. The matter was specifically raised, discussed and determined in the Constitutional Convention of 1787. Thus the New Jersey plan presented by Mr. Paterson on June 15 authorized the Executive to direct all military operations, "provided that none of the persons composing the federal Executive shall

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[15] Lieber, Remarks on Army Regulations, 18; see also Watson, On the Constitution, II, 913-914; Von Holst, Constitutional Law of the United States, 194.

[16] McClain, Constitutional Law, 210.

[17] Finley & Sanderson, op. cit., 267.

[18] Watson, On the Constitution, II, 919; cf. Miller, On the Constitution, 163; Von Holst, Constitutional Law of the United States, 197.

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on any occasion take command of any troops, so as personally to conduct any enterprise as General or in any other capacity."[19] Hamilton's plan likewise vested the chief command and direction of war in the Executive, but with the proviso that "he shall not take the actual command, in the field, of an army, without the consent of the Senate and Assembly."[20]

The action of the Convention in refusing to adopt any of these specific proposals,[21] and the further attempts in the state ratifying conventions to secure amendments expressly forbidding such exercise of command by the President,[22] certainly make it clear that the framers of the Constitution understood and intended that the President should have that right. Hamilton but reflected the general interpretation of the Constitution when he referred to the President in this connection as the "first general and admiral of the Confederacy".[23]

While there is therfore no doubt as to the constitutional

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[19] Elliot's Debates, I, 176.

[20] Ibid., V, 587.

[21] See Luther Martin's letter to the Maryland legislature: "Objections were made to that part of the article, by which the President is appointed Commander-in-Chief of the army and navy of the United States, and of the militia of the several States, and it was wished to be so far restrained, that he should not command in person; but this could not be obtained." Ibid., I, 378; Farrand's Records, III, 217-218.

[22] Thus the New York convention proposed an amendment, "That the President or person exercising his powers for the time being, shall not command an army in the field in person, without the previous desire of Congress;" while in the Maryland convention a similar amendment was submitted, but negatived in committee and never reported. Elliot's Debates, I, 330; II, 553. In the 1st Congress Mr. Tucker (S. C.) proposed an amendment striking out the words "be Commander-in-Chief" from the article defining the President's powers and substituting the phrase "have power to direct (agreeably to law) the operations." This was probably in line with the New York amendment; but on a vote to refer to the Committee of the Whole, it was negatived. Annals of Cong., 1 Cong., I, 762,763.

[23] The Federalist, No. 68, (Goldwin Smith ed., p. 381).

right of the President to assume personal command of the armed forces at his discretion, the sound construction of the constitutional provision is that no such action on his part was contemplated unless in an extraordinary emergency; that the power of personal command was vested in the President principally for the purpose of giving him that control over military and naval operations which is a necessary attribute of the executive branch of the government.[24]

No President has yet seen fit to exercise his right to take personal command of the forces in time of war, although Washington on one occasion during his administration did actually take the field in command of militia forces called out to suppress an insurrection.[25] President Polk also took a keen personal interest in the military movements of the Mexican War, and at one time, in order to carry his point against a refractory Adjutant-General, insisted on his right as Commander-in-Chief to have his instructions regarded as a military order to be promptly obeyed.[26] President Lincoln, while never exercising actual personal command, frequently visited his generals in the field, advised with them, drew up plans of campaign, and issued among others his famous General War Order No. 1 (January 27, 1862), and Special War Order No. 1 (January 31, 1862), the former ordering a general movement of the land and naval forces to be begun against the insurgents on February 22, the lat-

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[24] Cf. opinion of Secretary of War Monroe, given to a committee of Congress, Feb. 11, 1815. Am. State Papers, Mil. Affairs, I, 606; see also Story, Commentaries on the Constitution, II, 315; Elliot's Debates, II, 366.

[25] Infra, 149.

[26] Diary of James K. Polk, III, 31.

ter ordering an expedition against Manassas Junction.[27]

Presidents McKinley and Wilson seem to have left the active direction of military movements entirely to the military and naval commanders, although with the modern means of communication the President might, much more easily than before, assume active charge of military and naval operations.[28] Modern war has, however, also added such a heavy burden of civil duties upon the President as to make it practically impossible for him to devote any time to the purely military side, and it is not likely that any President will ever in the future attempt to exercise his right of personal command.

As a necessary part of his power to direct the military and naval operations, the President in time of war has entire control of the movements of the army and navy. Congress has, under the Constitution, the sole power to raise and support armies and to provide and maintain a navy;[29] but after the forces have been provided and war has been begun, the President may order them anywhere he will for the purpose of carrying on the war to a successful conclusion.

An eminent authority thinks that Congress could probably by law forbid the troops being sent out of the jurisdiction of the United States in time of peace;[30] but in time of war the authority of the President is recognized as being absolute as to where the

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[27] Works of Abraham Lincoln (Federal ed.),V,423,425; Rhodes, History of the United States,III,581. But cf. Lincoln's letter to Gen. Grant, Apr. 30,1864: "Not expecting to see you before the spring campaign opens, I wish to express, in this way, my entire satisfaction with what you have done up to this time, so far as I understand it. The particulars of your plans I neither know nor seek to know." McPherson, History of the Rebellion, 425.

[28] See description of how President McKinley kept in touch with the military operations during the Spanish war. Beard, Readings in American Politics and Government, 316.

[29] Art. I, Sec. 2, Cl. 12, 13.

[30] Root, Colonial and Military Policy of the United States,157.

war is to be conducted, whether to await the onslaughts of the enemy and wage a purely defensive war within the boundaries of the United States or to send the armed forces of the United States out of the country to carry on an offensive war in the enemy territory, in the territory of an ally, or perhaps even in the territory of a neutral. "The power to use an army," says a distinguished ex-Justice of the Supreme Court, "is co-extensive with the power to make war; and the army may be used wherever war is carried on, here or elsewhere. There is no limitation upon the authority of Congress to create an army and it is for the President as Commander-in-Chief to direct the campaigns of that army wherever he may think they should be carried on."[31]

As a matter of fact, there never has been any serious doubt as to the President's constitutional power to order the regular forces wherever he may think best in the conduct of a war, whether within or without the limits of the United States, nor has any President hesitated to make use of that power in any foreign war in which the United States has been engaged. Regular troops were by order of the President sent to Canada in the War of 1812,[32] to Mexico in 1846, to Cuba, Porto Rico, and the Philippines during the war with Spain, and to France, Italy, and Russia during the

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[31] Charles E. Hughes, "War Powers under the Constitution", in Central Law Jour., LXXXV, 206-214 (Sept. 21, 1917). See also Fleming v. Page, 9 How., 603, 615 (1849).

[32] The act of Feb. 6, 1812, authorized the President to accept 50,000 volunteers to do duty whenever he deemed proper, which President Madison said was passed "with a view to enable the Executive to step at once into Canada." Writings of James Madison, VIII, 176.

recent war with Germany.[33]

Just as the President decides when and where troops shall be employed in time of war, so he alone likewise determines how the forces shall be used, for what purposes,[34] the manner and extent of their participation in campaigns, and the time of their withdrawal. Thus the troops ordered to France during the recent war were sent for the general purpose of waging active war against the German military forces and of bringing about their defeat; were with that end in view instructed to cooperate with the Allies even to the extent of being intermingled on occasion with Allied troops and placed under the command of superior Allied officers; and were withdrawn from foreign soil as rapidly as possible after that purpose had been accomplished.

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[33] The constitutionality of the President's action in sending troops to France was upheld by Federal Judge Speer in a case decided Aug. 20, 1917. See also address by ex-Sen. Root at Chicago, Sept. 14, 1917, in *The War, Russian and Political Addresses*, 68.

For an opposite view, see a somewhat bombastic open letter to the Secretary of War by Hannis Taylor, in which he says: "The unauthorized transportation by the executive power of our conscripted National Militia to the battlefields of Europe, in defiance of section 8, Article I, of the Constitution, will stand out in the time to come as the most stupendous act of illegality in all our history." *Cong. Record*, 65 Cong., 3 Sess. (Jan. 20, 1919), 1728-1729.

A House resolution (H. J. Res. 166) was introduced July 29, 1919, proposing an amendment to forbid Congress to conscript armies to serve outside the United States to execute orders of any international body or tribunal. *Ibid.*, 66 Cong., 1 Sess., 3561.

[34] "The policy to be followed by our troops in any country is one to be determined by the Executive." Statement of Maj. Gen. Graves in message to his troops in Russia, quoted in *The Nation*, CVIII, 853 (May 31, 1919). *The Nation* comments as follows: "So much for Wilsonian *Realpolitik* by comparison with the old-fashioned theory that it is the business of Congress to declare war."

The Siberian expedition, while of course intended to aid in a general way in bringing about the defeat of the Central Powers, had the more limited and particular purposes of saving the Czecho-slovak armies in Russia from destruction, and of steadying the efforts of the Russians at self-defense and the establishment of law and order. It was not withdrawn upon the defeat of the Central Powers and the conclusion of the armistice, but was continued for some time in order "that we, with the concurrence of the great allied powers, may keep open a necessary artery of trade and extend to the vast population of Siberia the economic aid essential to it in peace time, but indispensable under the conditions which have followed the prolonged and exhausting participation by Russia in the war against the Central Powers." To that end, Major General Graves, in command of the American troops in Siberia, was instructed "not to interfere in Russian affairs, but to support Mr. Stevens" (the American director of the Russian Railway Service Corps) in keeping open the Siberian railway.[35] In contradiction to this policy of continuing the American troops in Siberia, the small contingent sent to Murmansk and Archangel in Russia proper was entirely withdrawn by July 1, 1919.[36] The action in every case was determined solely by authority of the President, acting under his power as Commander-in-Chief of the army and navy.

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[35] See statement of President Wilson, July 22, 1919, in response to a Senate resolution of inquiry. Cong. Record, 66 Cong., 1 Sess. (Sept. 3, 1919), 5075. The President's statement is also printed as Senate Doc. No. 607. See also statement of the Acting Secretary of State regarding the purposes of the Siberian expedition. Official Bulletin, Aug. 5, 1918. Secretary of War Baker announced on Jan. 13, 1920, that the President had authorized the withdrawal of the American forces from Siberia, and that the movement of troops would begin at once.

[36] See statement of Gen. March, Chief of Staff, June 16, 1919. Hearings before the Subcommittee of the Committee on Military Affairs 66 Cong., 1 Sess., 50.

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There has been considerable bitter criticism in Congress of the President's Russian or Siberian policy; there has also been come question as to his power to send and continue troops there, especially since the signing of the armistice and the virtual ending of the war; and there have even been some attempts to assert for Congress the right to control the movements of the forces and to compel their withdrawal. Senator Borah (Idaho) in a recent speech declared the presence of American troops in Siberia an unlawful usurpation of power by the President and demanded their immediate withdrawal. "We are utterly at sea," he said, "as to why our armed forces are carrying on war in Russia, but whatever is being done in that country in the way of armed intervention is without authority. . . There can be no plainer usurpation of power than to conscript men to war against Germany and then to use them to take care of internal conditions in Russia."[37] Senator Edge (New Jersey) introduced a resolution June 23, 1919, not only declaring the state of war terminated, but ordering "That all American soldiers of the forces of the United States now in Europe shall be withdrawn from such foreign service without loss of time and be returned to the United States, except such soldiers of the United States Regular Army as have enlisted specifically for service in Europe."[38] Senator McCormick (Illinois) introduced a similar resolution September 8, expressing it as the sense of the Senate "that no additional

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[37] *N. Y. Times*, Sept. 6, 1919; cf. also statement of Chairman Porter, of the House Committee on Foreign Affairs, that the drafted men were sent to Siberia with "absolutely no justification in law." *Ibid.*, Aug. 24, 1919. But compare Senator Borah's remarks in the Senate, Feb. 16, 1909: "Congress has not the power to say that an army shall be at a particular place at a particular time or shall maneuver in a particular distance. *That belongs exclusively to the Commander-in-Chief of the Army*". *Cong. Record*, XLIII, Pt. 3, (60 Cong., 2 Sess.), 2452. See also his speech of Nov. 4, 1919. *Ibid.*, 66 Cong., 1 Sess., esp. 8465, 8466.

[38] *Cong. Record*, 66 Cong., 1 Sess., 1629.

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troops be sent overseas except by the express authority of Congress," and "that all troops serving in Europe and Siberia should be brought home with the utmost dispatch."[39]

Other similar resolutions have been proposed from time to time,[40] but only one has been adopted, that by Senator Johnson (California), which, however, was merely a request for information as to the general policy respecting Siberia and the maintenance of troops there.[41] It seems pretty clear, therefore, that even under the stress of bitter partisanship and despite all its mutterings and criticisms of executive policy, Congress will be slow to deny the power of the President as Commander-in-Chief to send and maintain troops of the army and navy abroad at his discretion, or to assert any definite claim of control for itself. On the other hand, the Executive has not hesitated to define its policy or to assert its intention of adhering to and exercising its powers under the Constitution with respect to the movement of troops.[42]

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[39] Cong. Record, 66 Cong., 1 Sess., 5284.

[40] By Senators Johnson and Poindexter, and Representatives Rhodes, Wood, and Mason. Ibid., 65 Cong., 3 Sess., 3188, 3410-3417, 3786; 66 Cong., 1 Sess., 64, 4336, 4704, 4937.

[41] Ibid., 66 Cong., 1 Sess., 63, 1631, 1884, 1977.

[42] President Wilson stated, in a letter to Fred McAver of Chicago, that the drafted troops in Siberia were being withdrawn as rapidly as they could be replaced by volunteers, but indicated that there was no intention of withdrawing the entire expedition for some time. N. Y. Times, Aug. 27, 1919. Secretary Baker, in a statement to the House Military Affairs Committee, Sept. 15, 1919, insisted that the American soldiers in Siberia could not be withdrawn because of "real military and humanitarian reasons." Ibid., Sept. 16, 1919. Representative Mason (Ill.) on this occasion questioned the right of the President to send troops into a country with which we are not at war, but was opposed by Representative Kahn (Cal.), Chairman of the Committee, who cited as a precedent the sending of marines into Haiti. Ibid. See also statement of Gen. March, Chief of Staff, before the Senate Subcommittee on Military Affairs, June 16, 1919. Hearings before the Subcommittee, 50, 51.

In connection with his control of military and naval operations, the President possesses numerous other powers. In fact, it is generally held that, as Commander-in-Chief, he may do practically anything calculated to weaken and destroy the fighting power of the enemy and bring the war to a successful conclusion, subject of course to the rules of civilized warfare prescribed by international law and custom.[43] He may employ secret agents to obtain information concerning the position, resources, and general condition of the enemy;[44] he may establish a blockade of the enemy's ports, including those of insurgent states as well as of a foreign enemy;[45] he may order an invasion of the enemy's country and establish the authority of the United States over it, although he cannot thereby enlarge the boundaries of the United States nor extend the operation of our institutions and laws beyond the limits previously assigned to them;[46] he may even set up, on his own exclusive authority as Commander-in-Chief, a temporary government in conquered territory.[47]

The appointment and dismissal of officers for the army and navy is another of the President's prerogatives as Commander-in-Chief, but one which is subject to some control by Congress.[48] In

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[43] Fairlie, National Administration of the United States, 33.

[44] Totten v. U. S., 92 U. S., 105, 106 (1875).

[45] Prize Cases, 2 Black, 635 (1862). Ordinarily such a blockade is established by proclamation of the President. It may, however, be established without this action by the President, but by the commander of naval forces as an adjunct to naval operations against other blockaded ports and the enemy's fleet. The Adula, 176 U. S., 361, 366-367 (1900); President Lincoln established the blockade of the ports of the South by proclamations of Apr. 19 & 27, 1861; President McKinley the Cuban blockade by proclamations of Apr. 22 & June 27, 1898. Richardson, Messages and Papers of the Presidents, VI, 14, 15; X, 202-203, 206.

[46] Fleming v. Page, 9 How., 603, 615 (1849).

[47] Infra, Ch. IX.

[48] Cf. Burgess, Political Science and Comparative Constitutional Law, II, 261-262.

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the first place, no officer can be appointed by the President until Congress has created the grade and made provision for it. President Polk complained bitterly because Congress refused to create the grade of Lieutenant-General during the Mexican War and thus permit him to appoint a commander to outrank Scott and Taylor. "My situation", he said, "is most embarrassing. I am held responsible for the War, and I am required to entrust the chief command of the army to a General in whom I have no confidence."[49] During the recent war, however, Congress gave the President authority (with the consent of the Senate) "to appoint for the period of the existing emergency such general officers of appropriate grades as may be necessary.".[50] thus vesting the President with wide discretionary powers, not only of appointment but also of determining what higher grades might be necessary. Under this provision, Pershing, Bliss, and March were each appointed to the rank of full General, a grade thus revived by the President for the period of the war.[51]

In the second place, the appointment of all officers of the army and navy is subject to confirmation by the Senate, unless otherwise provided by law.[52] As a matter of fact, confirmation by the Senate has generally been required only in the case of the higher military and naval officers, the rule during the recent war being, "That officers with rank not above that of Colonel shall be appointed by the President alone, and officers above that grade by the President by and with the advice and consent of the Senate."[53]

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[49] Diary of James K. Polk, II, 393-394.
[50] Selective Service Act of May 18, 1917 (Public No. 12, 65 Cong.). See Sec. 8.
[51] Gen. Pershing has since been commissioned permanent General, by authority of act of Congress. See N. Y. Times, Sept. 4, 1919.
[52] Constitution, Art. II, Sec. 2, Cl. 2.
[53] Selective Service Act, Sec. 1.

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Finally, Congress, under its power "to make rules for the government and regulation of the land and naval forces,"[54] may prescribe rules of eligibility governing the appointment and promotion of officers, and in that way limit to a considerable extent the President's power of appointment. It has been held, however, that such rules can prescribe only the mode in which vacancies shall be filled, and hence do not confer upon the officer next in the order of succession any right to the vacant place, nor control the President in his discretionary power to appoint some other individual.[55] Congress can in no way dictate what appointments shall be made; it can only determine how they shall be made and limit somewhat the field of selection by prescribing certain rules. Moreover, the President is entirely free to select whom he will from among the officers for any particular duty or command, without consulting the Senate and without regard to seniority in rank. General Pershing was thus chosen to command the American Expeditionary Force in the recent war, although he was not the ranking officer in the army at the time. In fact, any question that may arise as to the relative rank of officers in the various branches of the service is understood to be within the power of the President, as Commander-in-Chief, to settle without legislation by or consultation with Congress.[56]

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[54] Constitution, Art. I, Sec. 8, Cl. 14.

[55] 13 Op. Atty. Gen., 13, 14; 29 ibid., 254, 256. See also message of President Monroe, Apr. 13, 1822, and veto message of President Harrison, Feb. 26, 1891. Richardson, op. cit., II, 132, 133; IX, 138. Cf. Taft, Our Chief Magistrate and His Powers, 127-128; and Story, Commentaries, II, 350, n. 2. During the recent war, the rules governing appointments, promotions, and assignments were announced by General Order. Official U. S. Bulletin, Sept. 20, 1918.

[56] Diary of James K. Polk, I, 284-285.

The power to dismiss or remove military and naval officers, especially in time of war, is likewise considered one of the prerogatives of the President as Commander-in-Chief, and a necessary incident of his right to appoint them.[57] In fact, it has been held by distinguished authority to be an absolute power, though one that ought to be exercised with great discretion,[58] and extends even to the removal of officers appointed with the consent of the Senate.[59] From the very organization of the government under the Constitution till the Civil War, the power to dismiss officers of the army and navy from the service was regarded as vested in the President by the Constitution, was not questioned, and came to be considered as one of the inherent powers of the Executive office.[60] Congress in 1862 specifically recognized this power of the President in an act[61] which the Attorney-General later characterized as "simply declaratory of the long-established law."[62]

However, by the acts of March 3, 1865, and July 13, 1866, Congress divested the President of his absolute power of removal at all times, requiring that in time of peace an officer could be dismissed only upon sentence of a court-martial or as commutation of such sentence.[63] In 1867, Congress went further, and in the Army Appropriation Act of that year provided that all army orders should pass through the General of the army, who was required to keep his headquarters at Washington and who should not be removed,

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[57] Burgess, op. cit., II, 262; Blake v. U. S., 103 U. S., 227, 236 (1880).
[58] Memoirs of John Quincy Adams, IV, 410.
[59] Shurtleff v. U. S., 189 U. S., 311, 314-315 (1903).
[60] 4 Op. Atty. Gen., I, 609-613; 6 ibid., 5-6; 8 ibid., 230-232; 12 ibid., 424-426. cf. U.S.v.Guthrie, 17 How.,283,306-307 (1854).
[61] Act of July 17, 1862. 12 Stat. at L., 594, 596 (Sec. 17).
[62] 15 Op. Atty. Gen., 421.
[63] 13 Stat. at L., 489; 14 ibid., 92.

suspended, relieved from his command, or assigned to duty elsewhere, except at his own request or by the approval of the Senate.[64] President Johnson signed this act under protest, holding that it in effect deprived the President of the command of the army; and having obviously been passed as a measure designed to control him in particular, its injustice and inexpediency were soon recognized and it was soon repealed.[65] The Supreme Court further held, with regard to the act of 1866, that it was in effect only a declaration that the power thereto exercised by the President of summarily dismissing officers without the consent of the Senate, should not exist in time of peace. "There was, we think, no intention to deny or restrict the power of the President, by and with the advice and consent of the Senate, to displace them by the appointment of others in their places."[66]

The right of the President to make removals at his discretion in time of war remained unimpaired by these acts of Congress, and was again specifically recognized during the recent war by the Selective Service Act.[67] Efficiency Boards for examining into the qualifications of officers were provided for by that statute, but it was held that these were to be convened merely as a matter of administrative convenience for the information of the President, and "do not impair or restrict the power of the President to discharge for any cause which, in the judgment of the President, would promote the public service." It was further held that, even though the President dismissed an officer because of the recommendation of an illegally and irregularly constituted board, "the legality of an

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[64] Act of Mar. 2, 1867. 14 Stat. at L., 486-487 (Sec. 2).
[65] July 15, 1870.
[66] Blake v. U. S., 103 U. S., 227, 236 (1880).
[67] Secs. 1, 9.

executed discharge by the President cannot afterwards be questioned, because of the full and summary powers conferred upon him by the statute."[68] Other opinions have likewise upheld the inherent, as well as the statutory, power of the President to dismiss officers in time of war, without the consent of the Senate, or the recommendation of a board, or trial by court-martial.[69] Having once dismissed an officer, however, or accepted his resignation, the President cannot revoke that action and thereby restore the officer to his rank and office, but must make a new nomination and secure a new confirmation by the Senate, if confirmation was required in the first instance.[70]

In spite of the restrictions that have been noted, the President's power to appoint and dismiss officers is such as to give him practically complete control of the army and navy, especially in time of war, and to add considerably to his powers and prestige as Commander-in-Chief. It is a power that was feared greatly at the beginning,[71] and it is a power that needs to be exercised with due caution lest political expediency rather than military fitness become the criterion for selection.[72] On the whole, it can be said that the President has in his exercise of this tremendous

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[68] Opinions of Acting Judge Advocate General Mayes, May 10 & July 15, 1918, in Wigmore, Source-Book of Military Law and War-Time Legislation, 752-755, 790-794.

[69] Cf. opinion of Acting Judge Advocate General Ansell, Apr. 9, 1918. Ibid., 731-735.

[70] Mimmack v. U. S., 97 U. S., 426, 435, 437-438 (1878); Memoirs of John Quincy Adams, VII, 14.

[71] See Luther Martin's letter to the Maryland legislature. Elliot's Debates, I, 379.

[72] For an interesting insight into the problem that sometimes confronts the President in this connection, see Diary of James K. Polk, I, 412-413. President Wilson has been accused of being guided chiefly by political considerations in declining to give ex-President Roosevelt a command during the recent war, and in refusing to assign Gen. Wood to overseas duty.

power generally placed the winning of the war above any thought of personal or political advantage to himself.

It might be well here to point out some distinctions between the President's control over the army and navy, and his control over the miliitia, for his powers of command with regard to the latter are considerably more limited than those with respect to the former. In the first place, the President is not at all times the commander-in-chief of the militia, as he is of the regular army and navy. The report of the Committee on Detail in the Convention of 1787 (on August 6) had made the President "commander in chief of the Army and Navy of the United States, and of the militia of the several States,"[73] thus making no distinction between the power of command over the militia and that over the regular forces, but giving the President complete command of both at all times. When the report came before the Convention, however (on August 27), objection was immediately made and Mr. Sherman's amendment giving the Executive command of the militia only "when called into the actual service of the United States" was adopted with but two dissenting votes.[74] That change in language placed a very definite restriction on the power of the President to command the militia only upon the stated occasions, it being at other times under the command of the executive of each particular state.

In the second place, the President cannot order the militia into "the actual service of the United States" and thus become its commander-in-chief, simply upon his own authority1 The Constitution

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[73] Madison's Journal (Hunt ed.), II, 86.

[74] Ibid., II, 255. The jealous care with which the states wished to preserve the militia as distinctively state troops under the command of state authorities is shown further by the various amendments proposed in the state ratifying conventions. See Elliot's Debates, I, 331, 335; II, 545-546, 552; III, 660; IV, 108, 245.

gives the President no authority in that respect, but vests in Congress the power "to provide for calling forth the militia."[75] It is true that Congress has carried out this constitutional provision by giving the President in turn definite statutory authority to call out the militia under certain circumstances; nevertheless it also remains true that while the President's power to command the army and navy is complete and exclusive, he has over the militia, in the words of Hamilton, "only the occasional command of such part as by legislative provision may be called into the actual service of the Union."[76]

Thirdly, the President is very definitely limited in the purposes for which he may use the militia, even after it has been lawfully called out and placed under his command. The Constitution gives Congress the right to provide for calling forth the militia only "to execute the laws of the Union, to suppress insurrections, and to repel invasions,"[77] and of course Congress cannot empower the President to use the militia for any other purposes.

The President has, however, been granted as wide powers as this constitutional provision will permit. By the Act of September 29, 1789, Congress authorized the President to call out the militia to repel Indian invasions,[78] and the Act of May 2, 1792, extended that authority to include all the cases mentioned in the Constitution. This act, as well as the Act of February 28, 1795, broadened the power of the President still further by authorizing

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[75] Constitution, Art. I, Sec. 8, Cl. 15.

[76] The Federalist, No. 68 (69) (Goldwin Smith ed., p. 381). See also Johnson v. Sayre, 158 U. S., 109, 115 (1895). Cf. President Fillmore's discussion of the distinction between the President's powers in this respect in his message of Feb. 19, 1851. Richardson, op. cit., V, 104.

[77] Constituion, Art. I, Sec. 8, Cl. 15.

[78] Annals of Cong., 1 Cong., II, App., 2199 (Sec. 5).

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him to call out the militia not only in case of actual invasion, but also whenever there is "imminent danger of invasion from any foreign nation or Indian tribe,"[79] thus introducing for the first time the element of discretion. By means of amendments and supplementary acts, the powers of the President in this respect have been still further broadened and amplified.[80]

Several important constitutional questions as to the power of the President have been raised under the provisions of these acts. Thus, when President Madison called out the militia for service in the War of 1812, the question immediately arose as to where the power rested to determine when the emergency contemplated by the Constitution existed. The governors of three states (Massachusetts, Connecticut, and Rhode Island) refused to respond to the call, in part on the ground that it was within the power of the executive of each state to determine whether the need for militia was so great as to warrant its being called out, and that in their opinion no such emergency existed at that time. In this opinion they were supported by the Massachusetts Supreme Court and the Hartford Convention.[81] Secretary of War Monroe, however, dissented vigorously from this view and held that it was within the discretion of the President alone to determine the existence of a constitutional exigency for calling out the militia.[82] He was supported at the time by the committee of Congress chosen to investigate the situa-

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[79] Annals of Cong., 2 Cong., App., 1370 (Sec. 1); 3 Cong., App., 1508 (Sec. 1).

[80] Acts of July 29, 1861; Dick Militia Act of 1903; National Defense Act of 1916. 12 Stat. at L., 281; 32 ibid., 775, 776; 39 ibid., 166, 201.

[81] McMaster, History of the People of the United States, III, 544-546; IV, 251; Am. State Papers, Mil. Affairs, I, 605, 610-612; 8 Mass., 548, 549.

[82] Am. State Papers, Mil. Affairs, I, 605-606.

tion,[83] and later by the Supreme Court,[84] and it is now generally recognized that the President has exclusively this discretionary authority.

Another much-disputed question concerns the extent to which the President may use the militia outside the limits of the United States. In the War of 1812, in the Seminole War of 1818, and in the Mexican War of 1846, the militia was ordered out and actually used across the border of the United States,[85] the action in every case being based on the authority for its use in repelling invasions. There was some attempt in Congress in 1812 to give the President definite statutory authority to use the militia forces outside the United States, but after a debate in which most of the members seemed to think such use unconstitutional, the matter was left unsettled.[86] In the Seminole War of 1818, specific authority was given to use the troops (consisting largely of militia) across the Florida border in case of necessity,[87] and in the Mexican War the President was expressly authorized to call out militia to serve during the war, which it was known would be waged on enemy soil.[88] Quite recently Congress again showed its inclination to permit the use of militia outside the limits of the United States when in the

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[83] See its report, *Am. State Papers, Mil. Affairs*, I, 604.

[84] *Martin v. Mott*, 12 Wheat., 19, 31-32 (1827); *Luther v. Borden*, 7 How., I, 43 (1848). The various occasions upon which the militia has been called into the federal service are cited by Quincy Wright in "Military Administration", in *Report of the Efficiency and Economy Committee, State of Illinois, 1915*, 897-903.

[85] McMaster, *op. cit.*, III, 438; IV, 12-18; Quincy Wright, *op. cit.*, 898, 899.

[86] *Annals of Cong.*, 12 Cong., I, 728-802; *Elliot's Debates*, IV, 459-460; McMaster, *op. cit.*, III, 438.

[87] See message of President Monroe, Mar. 25, 1818, *Am. State Papers*, *Mil. Affairs*, I, 681; letter of Sec. of War Calhoun to Gen. Gaines, Dec. 16, 1817, *ibid.*, 689.

[88] Quincy Wright, *op. cit.*, 899; cf. Upton, *Military Policy of the United States*, 196-197; Act of May 13, 1846, 9 *Stat. at L.*, 9, (Secs. 1, 2).

amendment of 1908 to the Dick Militia Act of 1903, it was provided that when called out, "the militia shall continue to serve during the time so specified, either within or without the territory of the United States unless sooner relieved by the order of the President."[89] A similar provision was included in the Act of February 16, 1914, with regard to the naval militia.[90]

The constitutionality of these provisions has been in dispute. A portion of the militia ordered into Canada in 1812 refused, on constitutional grounds, to cross the border, and a high authority thinks it doubtful whether any military court could have vindicated its jurisdiction had it attempted to punish this disobedience.[91] A portion did cross, however, and the precedents of the wars of 1812, 1818, and 1846, would seem to be authority for the view that militia may be used outside the United States if necessary to repel invasion. Attorney-General Wickersham took that view in an opinion rendered in 1912: "If the militia were called into the service of the General government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose."[92] Pomeroy, however, holds that "in no case can they be compelled to serve without the territory of the Union. The laws must be executed where they have force, and that is only within the country itself. Insurrections and invasions must be internal.

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[89] 35 Stat. at L., 399, 400 (See Sec. 3).

[90] 38 Ibid., 283, 284 (Sec. 4).

[91] Ordronaux, Constitutional Legislation in the United States, 504. McMaster seems to think the refusal of the militia to cross was due to cowardice rather than to any constitutional scruples. History of the People of the United States, IV, 12.

[92] 29 Op. Atty. Gen., 322, 324.

We do not repel an invasion by attacking the invading nation upon its own soil." The furthest he is willing to go is to admit that the militia may be called out before the invaders have set foot upon our territory. "It is a fair construction of language to say that one means of 'repelling' an invasion is to have a force ready to receive the threatened intruders when they arrive."[93]

While there may thus be some doubt as to whether, or to what extent, the militia may be used outside the United States in the repelling of invasions, practically all authorities seem to agree that it cannot be used, as militia, for the purpose of invading a foreign country or carrying on an offensive war outside the jurisdiction of the United States. Thus Attorney-General Wickersham, in the same opinion in which he held that militia might be taken across the border to repel an invasion, held the act of 1908 unconstitutional in so far as it authorized the use of the militia, as such, for the purposes of warfare in foreign countries.[94] Judge Advocate General Davis in 1908 had rendered an opinion to the contrary, arguing that a declaration of war is a law for the execution of which the militia may be called out and sent wherever necessary to carry out its purposes:[95] but the weight of authority is in support of the view that the militia cannot as such be sent out of the United States for the purposes of a foreign war.[96]

Finally, with regard to the appointment of officers for the command of the militia, the powers of the President are very

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[93] Pomeroy, Constitutional Law (Bennett's ed.), 387.

[94] 29 Op. Atty. Gen., 329.

[95] See Cong. Record, XLII (60 Cong., 1 Sess.), 6943; cf. opinion of Asst. Atty. Gen. Boyd on the position of the militia in the Spanish War. 22 Op. Atty. Gen., 225, 227-228; 536, 540.

[96] Pomeroy, Constitutional Law, 387; Von Holst, Constitutional Law, 170; Ordronaux, Constitutional Legislation, 501-502; Dig. Ops. J. A. G. (ed. 1901), 483.

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much limited. The Constitution definitely reserves to the states the appointment of such officers,[97] but the Constitution is not clear as to what authority may appoint the *commanding* officers when several different militia units, or militia from several different states, are called into the service of the United States.

There is no doubt that the President himself may take personal command on such occasions, since he is made commander-in-chief of the militia "when called into the service of the United States," as he is of the regular army and navy at all times. President Washington was not only clear as to his right to take personal command of the militia forces upon such occasions, but, in the case of the Whiskey Rebellion in 1794, was also convinced of the necessity for exercising that right. He assumed active command of the militia forces assembled to crush the insurrection, visited the place of rendezvous, and personally directed the forward movement of the troops, living and marching with them as active commander in the field from September 25 to October 20, when, as he informed Congress in his message of November 20, "if the state of things had afforded reason for the *continuance of my presence with the army*, it would not have been withholden. But every appearance assuring such an issue as will redound to the reputation and strength of the United States, I have judged it most proper *to resume my duties at the seat of Government, leaving the chief command with the Governor of Virginia* (Major-General Henry Lee)".[98] There was apparently some criticism of Washington's course at the time as being unconstitutional, which the President denounced as "impertinence",[99] although he was careful to say that "imperious circumstances alone" could

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[97] Art. I, Sec. 8, Cl. 16.

[98] *Am.State Papers*,*Misc.*,I,84; See also letters of Washington to Maj.Gen.Daniel Morgan,Oct.8,1794,and to Maj.Gen.Lee,Oct.20,1794. *Writings of George Washington*,XII,469-470,479-480;cf.Oliver,*Alexander Hamilton*, 346-347.

[99] *Writings of George Washington*,XII,474.

justify his absence from the seat of government while Congress was in session.[100]

Washington's action in this case was not of course a case of exercising personal command in time of actual war, but of domestic trouble. Nevertheless it is significatnt as showing that Washington did not hesitate to leave his civil duties to take active command of troops in the field, even when Congress was in session, and it is not at all unlikely that he would have done the same in case of more serious difficulties with foreign powers.

As a matter of fact, it was seriously asserted during the War of 1812, that when the militia was called into the service of the United States, the President could not delegate his right of command to any officer -- in other words, that he could under no circumstances appoint any other officer to command militia forces --; but that whenever different detachments of militia were called out, or militia from different states, the President was under the obligation of assuming personal command. This was the contention of the governors of the three states refusing to furnish militia, when, in reply to President Madison's call upon the militia for service during that war, they gave as one reason for objecting to letting the militia out from their jurisdiction, "That when the militia of a State should be called into the service of the United States, no officer of the regular army had a right to command them, or other person, not an officer of the militia, except the President of the United States in person."[101]

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[100] Writings of George Washington, XII, 469.
[101] Am. State Papers, Mil. Affairs, I, 605, 610-611.

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This view of the governors was sustained at the time by the Massachusetts Supreme Court,[102] but was later vigorously condemned by Secretary of War Monroe, in an opinion given to a committee of Congress, February 11, 1815, in which he said that such a construction was one "for which I can see nothing in the Constitution to afford the slightest pretext." He maintained that the President was under no greater obligation to command the militia in person than the regular troops; that the power to command both was vested in him principally for the purpose of giving him that control over military and naval operations which is a necessary attribute of the executive branch of the government; that his actual presence with the troops, either militia or regular forces, was under no circumstances necessarily contemplated by the Constitution; that "in construction of law he is commander-in-chief, though not present."[103]

Monroe's position with regard to the meaning of the Constitution was eminently sound. It can hardly be imagined that the framers of the Constitution intended anything else than that the President should be the judge as to the wisdom and necessity of his personal presence with the troops; still less can it be imagined that any distinction was intended between the President's obligations in that respect toward the militia and the regular forces. The general practice on all occasions upon which the militia has been called out, as well as authoritative opinion, would therefore indicate that when the militia has been called into the service of the United States, it comes under the control of the President as

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[102] Am. State Papers, Mil. Affairs, I, 611-612; 8 Mass., 548, 550. Cf. also debate in Congress, Apr. 17, 1812. Annals of Cong., 12 Cong., 1 Sess., II, 1324.

[103] Am. State Papers, Mil. Affairs, I, 606.

Commander-in-Chief, and may be commanded by him personally or by any officer designated by him, whether of the regular or militia forces.[104]

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[104] Ordronaux, Constitutional Legislation in the United States, 505; 2 Op. Atty. Gen., 711; Story, Commentaries, II, 316 n; Am. State Papers, Mil. Affairs, II, 102.

Chapter VIII.

Powers of Military Jurisdiction.

For the exercise of military jurisdiction, two principal military tribunals have come into being -- courts-martial, for the trial of offenders against military law, and military commissions, for the trial of offenders against the laws of war and under martial law.[1] The authority of the former is conferred and defined largely by statute, under the power given to Congress "to make rules for the government and regulation of the land and naval forces;"[2] while the authority of the latter is derived principally from the common law of war.[3]

Although the authorization of courts-martial is thus in the hands of Congress, their control afterwards rests almost exclusively with the Executive branch of the government. They are created, in every case, by military order issued by commanding officers having authority under the Articles of War to call them into being.[4] "They are creatures of orders, the power to convene them, as well as the power to act upon their proceedings, being an attribute of command."[5]

The President is expressly authorized by statute to con-

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[1] For the distinction between military law and martial law, see Manual for Courts-Martial, U. S. Army (ed. 1917), 1-2; Davis, Treatise on the Military Law of the United States (2nd ed.), 5; Birkhimer, Military Government and Martial Law (2nd ed.), 371-391. See also an excellent tabular statement in Davis, op. cit., 12.

[2] Constitution, Art.I,Sec.8,Cl.14. The rules enacted by Congress under this provision are for the most part included in what are called the Articles of War. The latest revision of these may conveniently be found in Manual for Courts-Martial,305-329 (App.I); also a concise history of the Articles in the same Manual, ix-xiii.

[3] See Lieber's Instructions for the Government of Armies of the United States in Time of War,G.O.100,A.G.O.,1863, in Birkhimer, op. cit., 635.

[4] Davis, Treatise on Military Law, 16.

[5] Dig. Ops. J.A.G., (ed.1901), 283.

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vene general courts-martial under certain circumstances.[6] He is by no means, however, limited to that specific case, nor dependent upon statutory authority, but is empowered to convene such courts-martial "generally and in any case", by virtue of his constitutional authority as commander-in-chief.[7] In an opinion rendered June 6, 1877, Attorney General Devens, after reviewing the law and precedents on this subject, said: "The authority of the President to appoint general courts-martial, in cases wherein he is not expressly authorized so to do by Congress, may therefore be regarded as well established. It rests directly upon the provision of the constitution which makes him Commander-in-Chief, as interpreted by the law and usage of the military service existing when that instrument was framed; it is sustained by the doctrine laid down in American works of authority on courts-martial, the views expressed by one of the standing committees of the House (that on Military Affairs) whose special business it is to make itself conversant with subjects of this character, and an official opinion of the late distinguished head of the Bureau of Military Justice, Judge Holt; and, moreover, it is confirmed by long-continued practice, extending back nearly to the beginning of the Government."[8]

That power of the President has further been supported by the Judiciary Committee of the Senate;[9] and it has been exercised on numerous occasions, both before and after the passage of the statute in question, notably in the cases of Brigadier General Hull (1813), Major General Wilkinson (1814), Major General Gaines (1816),

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[6] Act of May 29, 1830. 4 Stat. at L., 417.

[7] Swaim v. U. S., 165 U. S., 553, 558 (1897); Dig. Ops. J.A.G. 568; Davis, op. cit., 17.

[8] 15 Op. Atty. Gen., 302-303. See also ibid., 297-301.

[9] Report No. 868, Mar. 3, 1879, 45 Cong., 3 Sess., cited in Davis, op. cit., 17, n.

Major General Twiggs (1858), Brigadier General Paine (1865), and many others.[10] The power so exercised is "a striking illustration", as was said by one authority, "of an undefined constitutional power, for it is nothing less than the power to constitute tribunals with judicial jurisdiction extending even to trials for capital offenses."[11]

The fact that military commanders subordinate to the President may also upon occasion convene courts-martial, can in no sense be understood as a limitation upon the President's constitutional power to summon these courts at his discretion. "A military officer cannot be invested with greater authority by Congress than the commander-in-chief, and a power of command devolved, by statute, on an officer of the Army or Navy is necessarily shared by the President. . . Since the earliest legislation of our Government it has undoubtedly been understood and intended that whatever powers were granted to general officers were, at the same time, granted and intended to be shared by the President . . . whose name is understood as written in every statute which confers upon a military officer military authority."[12]

The President may, however, act through his subordinates. Thus, a convening of a general court-martial by the Secretary of War is held to be in law a convening by the President, and as legal as if the President himself had signed the order, such act of the Secretary being purely administrative and in law the act of the President whom he represents.[13]

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[10] See list of courts-martial convened by order of the President in 15 Op. Atty. Gen., 301-302.

[11] Lieber, Remarks on Army Regulations, 25.

[12] Davis, op. cit., 17, n; cf. 8th Article of War, in Manual for Courts-Martial, 309-310.

[13] Dig. Ops. J. A. G., 290, 568, 644-645.

The constitution of general courts-martials is also subject to the control of the Executive. The appointing authority, whether it be the President or a subordinate commanding officer, designates the number of officers, between the statutory maximum (13) and minimum (5), that are to constitute any particular court in any case, and his decision is final.[14] Even during a trial, members of a court may be relieved from duty with the court and ordered to other service, or new members may be added, without affecting the functioning of the court or the validity of its proceedings, provided merely that the membership is not reduced below the minimum nor increased beyond the maximum.[15] Even the reduction of a court below the minimum does not dissolve it, its sittings being merely interrupted until sufficient new members are added, and the validity of its proceedings being unaffected. "Thus the membership of the court, both as to numbers within statutory limits and as to personnel, is entirely within the control of the appointment or superior military authority at all times."[16]

The President also has entire control over the methods and procedure of courts-martial.[17] The procedure for preferring charges and bringing the accused to trial is prescribed almost exclusively by regulations and the customs of the service, while the rules of evidence are those of the Federal courts as modified by Executive regulations.

Likewise, the President may to a large extent control the findings and sentence of courts-martial. The Articles of War ex-

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[14] Martin v. Mott, 12 Wheat., 19, 34-35 (1827).

[15] Of course there are certain rules requiring the reading of the previous record to the new members, etc., but there is in no sense a retrial.

[16] E. M. Morgan, in Yale Law Jour., XXIX, 60-61.

[17] See 38th Article of War, in Manual for Courts-Martial, 314.

pressly provide that the approval of the appointing officer or of his successor in command is a condition precedent to the execution of any sentence, and that the appointing authority may approve or disapprove the finding, or approve or disapprove the whole or any part of the sentence.[18] The President acts as the reviewing authority in all cases tried by courts-martial convened by himself, either under his general authority as Commander-in-Chief, or as expressly provided by statute; in cases of sentences respecting general officers; in cases of sentences of death or dismissal adjudged in time of peace; and in all cases submitted to him for action in time of war. He may approve or disapprove in whole or in part the findings or the sentence, or he may mitigate the punishment.[19]

Also, by custom of the service, the President or other appointing authority may return the record in any case for reconsideration and revision, whether the finding is guilty or not guilty. A rule of procedure prescribed by President Wilson, effective August 10, 1919, modified this in so far as it abolished the power to return a finding of acquittal for reconsideration or any sentence for revision upward,[20] but of course another President or President Wilson himself might revoke this order and thus restore the former practice. While the Executive has thus almost complete control over the findings and sentences of courts-martial, Congress has no power whatever either to revise or reverse their judgments.[21]

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[18] 46th & 47th Articles of War. Manual for Courts-Martial, 315-316.

[19] Dig. Ops. J. A. G., 568-569. But when such approval or disapproval has once been given and the accused duly notified, it is beyond the power of the President to change his decision, even though his action may afterwards be found to have worked an injustice. 15 Op. Atty. Gen., 290, 297. Of course the President may still pardon the accused, if punishment is unexecuted.

[20] G.O.88,W.D.,sec.1, July 14,1919,quoted in Yale Law Jour.XXIX, 63,n.

[21] Am. State Papers, Mil. Affairs, V, 17-18.

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As in the case of the convening of courts-martial, so the action of the President respecting their procedure, findings, and sentence, while it should be the result of his own judgment,[22] need not be under his own hand,[23] any action of authorized subordinates, such as the Secretary of War and the Secretary of the Navy, being presumed in law to be the act of the President.[24] But confirmation of findings and sentence by some Executive authority being required in all cases before execution of sentence, courts-martial can hardly be considered as anything but advisory bodies, with the power of making recommendations or of reporting findings of fact and conclusions of law to a *non-judicial* superior, whose principal function is that of an executive.[25] "The system then is clearly one of review by superior military authority, which may, but need not, ask or follow the opinion of legal advisers, and is in no respect judicial. . . The principle at the foundation of the existing system is the *supremacy of military command*. To maintain that principle, military command dominates and controls the proceeding from its initiation to the final execution of the sentence."[26]

Courts-martial differ widely, therefore, from civil courts. The latter are created by statute, which also describe their composition, define their jurisdiction and procedure, and determine the times and places of their sessions. Courts-martial, though *authorized* by statute, are created and dissolved in every case by executive authority; the Executive likewise determines their

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[22] *Runkle v. U. S.*, 122 U. S., 543, 557 (1887).

[23] *U. S. v. Fletcher*, 148 U. S., 84, 88-89 (1893).

[24] *Ibid.*, 91; *U.S. v. Page*, 137 U. S., 673, 679-680 (1891); *Bishop v. U. S.*, 197 U. S., 334, 341-342 (1905).

[25] Glenn, *The Army and the Law*, 35-42.

[26] E. M. Morgan, *op. cit.*, 65, 66. The opinion of the Judge Advocate General is in some cases required before execution of sentence, but only by General Order. His advice is generally followed by the reviewing authority, but not necessarily, and it has been disregarded.

composition, defines their procedure, and controls their findings and sentence. It therefore seems correct to say, as do most authorities, that courts-martial are no part of the judiciary of the United States, but simply *agencies or instrumentalities of the Executive*.[27]

Military commissions, as contrasted with courts-martial, are of comparatively recent origin in the United States, having been initiated by General Scott in Mexico in 1847.[28] Courts-martial, as has already been noted, are instituted for the trial of offenders against *military law*, that is, their jurisdiction is restricted by statute to military persons and to certain specific offences defined by law. Hence other tribunals have been found necessary for the trial of civilians as well as military persons, who are accused of criminal acts contrary to the common laws of war and under martial

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[27] Davis, *op. cit.*, 15; *Dig. Ops. J. A. G.*, 283; Willoughby, *On the Constitution*, II, 1197. S. T. Ansell, recently Acting Judge Advocate General, admits this conclusion, but criticizes severely the system that makes such a conclusion necessary. See his article, "Military Justice," in *Cornell Law Quar.*, V, 11-17 (Nov. 1919), esp. 5-7. But compare the Supreme Court opinion approving the following statement by Attorney General Bates: "The whole proceeding from its inception is judicial. The trial, findings, and sentence are the solemn acts of a court organized and conducted according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can never be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law." *Runkle v. U. S.*, 122 U. S., 543, 558 (1887). For an excellent review and criticism of the present court-martial system, see an article, already occasionally referred to, by E. M. Morgan, "The Existing Court-Martial System and the Ansell Articles", *Yale Law Jour.*, XXIX, 52-74 (Nov., 1919). For a defense of the present system, see an article by G. G. Bogert, professor of law in Cornell University and recently Judge Advocate of the 78th Division, "Courts-Martial: Criticisms and Proposed Reforms," in *Cornell Law Quar.*, V, 18-47 (Nov., 1919).

[28] See Gen. Scott's G. O. No. 287, Sept. 17, 1847, in Birkhimer, *op. cit.*, 581-583 (Appendix I, Par. 10, 11.).

law, and for this purpose the military commissions have been established. Thus the military commission initiated by General Scott was mainly for the punishment of murder, robbery, and other violent crimes, committed either by civilians or military persons, and not at that time cognizable by a court-martial. At the same time another tribunal, called the "council of war", was inaugurated for the punishment of offences peculiar to war, and especially crimes by members of guerilla bands. Early in the Civil War these two tribunals were, by practice of the military commanders and sanctioned by the War Department, united into the one court called the "military commission".[29]

The authority for the creation of military commissions may therefore be said to be the same as that for the prosecution of war and for the exercise of military government and martial law -- they are "merely an instrumentality for the more efficient execution of the laws of war",[30] and as such are but another agency of the Executive. Though derived from the common law of war, the authority of military commissions has been recognized in statutes,[31] in executive proclamations,[32] in opinions of Attorneys-General,[33] and in rulings of the Supreme Court,[34] so that it is now "as well known and recognized in the laws of the United States as a court-martial".[35]

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[29] Winthrop, Abridgment of Military Law (2nd ed.), 331-332.

[30] Ibid., 331.

[31] Acts of Mar. 3, 1863 (sec. 30); July 2, 1864 (sec. 1); July 4, 1864 (secs. 6, 8); Mar. 2, 1867 (sec. 3); and several later appropriation acts.

[32] Proclamations of Sept. 24, 1862 & Apr. 2, 1866. Richardson, Messages and Papers of the Presidents, VI, 98-99, 429-432.

[33] 5 Op. Atty. Gen., 55; 11 ibid., 297; 12 ibid., 332; 13 ibid., 59; 14 ibid., 249.

[34] Ex parte Vallandigham, 1 Wall., 243 (1863); Ex parte Milligan, 4 Wall., 2 (1866).

[35] Davis, Treatise on Military Law, 308, n.

The President has practically complete control over the military commissions. There is no statute prescribing how or by whom they are to be constituted, or how they are to be composed. In practice, however, they have been created by the same authorities as are empowered to order courts-martial, which means the President himself at his discretion or his military commanders acting under his authority. Attorney-General Speed in 1865 upheld the right of the President to create such military tribunals even for the trial of non-military persons -- in this case the assassins of President Lincoln: "I do not think", he said, "that Congress can, in time of war or peace, . . create military tribunals for the adjudication of offences committed by persons not engaged in, or belonging to, such forces. . . But it does not follow that because such military tribunals cannot be created by Congress, . . that they cannot be created at all." The Attorney-General held that under the laws of war, which constitute the greater part of the law of nations and therefore are a part of the law of the land, military commanders are authorized to create and establish military commissions or other tribunals for the trial of offenders against the laws of war, whether these offenders are active or secret participants, that "obedience to the Constitution requires that the military should do their whole duty; they must not only meet and fight the enemies of the country, in open battle, but they must kill or take the secret enemies of the country, and try and execute them according to the laws of war."[36]

The composition of military commissions is entirely within the authority of the President to determine. There being no statu-

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[36] 11 Op. Atty. Gen., 297, 298, 299, 308, 316.

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tory maximum or minimum as to the number of members, as in the case of courts-martial, the discretion of the President is even wider than for those tribunals. Military commissions have, however, usually been composed of five members; less than three would be contrary to precedent; but any number would be legal.[37]

The jurisdiction of military commissions is not defined by statute, but extends in practice to violations of the laws of war, whether by civilians or military persons, in occupied enemy territory or in territory under martial law.[38] The power of the President to institute military government over occupied territory is exclusive,[39] and in that respect he controls the jurisdiction of military commissions. The power to institute martial law, while more doubtful, is generally held to belong properly, in time of war, to the Executive, as Commander-in-Chief. "The power of the Executive to prosecute a war precipitated upon the country carries with it by necessary implication", says one authority, "the incidental power to make use of the necessary and customary means of carrying it on successfully. If he deems the placing any district under martial law a proper measure, it is difficult logically to deny him the right to do it."[40] In practice, martial law is always instituted

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[37] Winthrop, op. cit., 333; Dig. ops. J. A. G., 463. The military commission convened by order of President Johnson for the trial of Lincoln's assassins was composed of 9 members. See Special Orders No. 211 & 216, May 6 & May 9, 1865, in Richardson, op. cit., VI, 335-336, 336-337.

[38] Winthrop, op. cit., 333; Dig. Ops. J. A. G., 464.

[39] Infra, Ch. IX.

[40] Birkhimer, op. cit., 378. He admits, however, that martial law may be invoked "either by the executive or the law-making power, although the former generally will be the case." Ibid., 390. But Pomeroy criticizes the position of the dissenting justices in Ex parte Milligan (4 Wall., 2) that Congress may, under certain circumstances, declare martial law, as "utterly indefensible". Constitutional Law, 594. Cf. Glenn, The Army and the Law, 185.

by Executive authority,[41] and hence military commissions are dependent upon the action of the President for their jurisdiction in that respect also. The violations of thelaws of war that come under the jurisdiction of the military commissions in these cases have been held to include all cases which do not come within the jurisdiction conferred by statute on courts-martial,[42] and in practice have extended to cover almost every conceivable offence, from the slightest sort of intercourse with the enemy to espionage and murder.[43]

In addition to the jurisdiction conferred under the common law of war and martial law, military commissions may be used as a temporary substitute for the local civil courts, when those courts, under the stress of circumstances, have ceased to function, though in such cases their jurisdiction should properly be regulated by the local statutes governing the courts for which they are substitutes.[44] But whether exercising jurisdiction under the laws of war or as a substitute for the local courts, there is practically no limit to that of the military commissions -- if they have jurisdiction of the person and the offence, they may proceed with the trial of offences committed even before the initiation of military government or martial law.[45]

The procedure of military commissions, not being prescribed by statute, is likewise under the control of the Executive.

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[41] Instances of the proclamation of martial law by Executive authority are given in Winthrop, op. cit., 329-330.

[42] Ex parte Vallandigham, 1 Wall., 243, 249 (1863).

[43] See list of offences charged as "violations of the laws of war" during the Civil War, in Dig. Ops. J. A. G., 465; also in Davis, op. cit., 310, n.

[44] Dig. Ops. J. A. G., 468.

[45] Ibid., 464; Birkhimer, op. cit., 533. But violations of the laws of war cannot legally be tried after the war or emergency has terminated. Winthrop, op. cit., 334.

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In practice, the rules of procedure laid down for courts-martial are generally observed, and authorities hold that these rules should apply as consistently as possible. That is not obligatory, however, and the powers of military commissions not being defined by law, their proceedings are legal even if details that are required in courts-martial or in civil courts are omitted, such as the administering of a specific oath to members of the court, or giving the accused the opportunity of challenge.[46]

There are likewise no statutes governing the power of the military commissions to inflict punishments, hence it is a power practically without restriction. These tribunals are not limited to the penalties known to courts-martial, nor are the strictly military penalties -- dismissal from the service, dishonorable discharge, and the like -- generally appropriate, since the persons to be punished are usually civilians. The punishments of death, imprisonment, or fine are those usually inflicted by military commissions, but, especially during the Civil War, have included also confiscation of property, forfeiture of licenses to trade, expulsion from certain sections of the country, furnishing bonds for good behavior, and taking the oath of allegiance.[47] In no case are the proceedings or sentences of military commissions subject to appeal to, or reversal by, any civil court.[48]

Military commissions, deriving their authority and jurisdiction from military usage and the common law of war, and their creation, composition, procedure, and decisions being subject to the complete control of the Executive, are therefore, even more than

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[46] Birkhimer, op. cit., 533-534; Winthrop, op. cit., 334.
[47] Winthrop, op. cit., 335.
[48] Ex parte Vallandigham, 1 Wall., 243, 251-252 (1863).

courts-martial, merely agencies of the Executive in his capacity as Commander-in-Chief. Through the courts-martial, as has been noted, the President is enabled to control the discipline of the armed forces and enforce military law. Through the military commissions he controls the administration of justice in war time, not only in the theater of active operations, but also in places declared by him to require the institution of martial law, and extending to all classes of civilians as well as to military persons.[49] By means of these tribunals, the President's powers to carry on the vigorous prosecution of a war are considerably extended; he is through them enabled to deal effectively with that class of persons who, while not engaged in open acts of hostility, may in one way or another be interfering with the success of the military operations.

Another power of the President, which should be noted as of some importance in this connection, is his power to grant reprieves and pardons. Though finally vested in the President without limitation, except in cases of impeachment,[50] the debates over the adoption of the Constitution reveal considerable fear of the war-time use of this power, that is, its use especially in cases of treason. Luther Martin expressed this fear when he said to the Maryland legislature: "The power given to these persons (i. e., the President and Vice-President) over the Army and Navy is in truth formidable, but the power of Pardon is still more dangerous, as in all acts of Treason, the very offence on which the prosecution would possibly arise, would most likely be in favour of the President's own power."[51] The New York ratifying convention of 1788 also

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[49] There are said to have been nearly 150 cases of women tried by military commissions during the Civil War. Davis, op. cit., 309, n.

[50] Constitution, Art. II, Sec. 2, Cl. 1.

[51] Farrand's Records, III, 158; see also ibid., 218.

showed its fear of this Executive power by proposing the following amendment: "That the executive shall not grant pardons for treason, unless with the consent of the Congress; but may, at his discretion, grant reprieves to persons convicted of treason until their cases can be laid before the Congress."[52]

The reason for vesting this power in the President was, however, well stated by Hamilton when he wrote: "But the principal argument for reposing the power of pardoning in this case (i. e., in case of treason) in the chief magistrate is this: in seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth, and which, if suffered to pass unimproved, it may never be possible afterward to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure would frequently be the occasion of letting slip the golden opportunity."[53]

Though Congress has on occasion attempted to assert some authority and to exercise some control with respect to the granting of pardons, particularly in cases of rebellion and treason,[54] the courts have uniformly held that the power of the President is complete and exclusive, and can in no way be restricted or limited in

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[52] Elliot's Debates, I, 330.

[53] The Federalist, No. 73 (74) (Goldwin Smith ed., p. 411). But Hamilton's own draft of a constitution contained this clause: "He shall have power to pardon all offences, except treason, for which he may grant reprieves, until the opinion of the Senate and Assembly can be had; and, with their concurrence, may pardon the same." Elliot's Debates, V, 587.

[54] See Acts of July 17, 1862 & July 12, 1870. 12 Stat. at L., 589, 592 (Sec. 13); 16 ibid., 230, 235.

its effects by Congress.[55] A pardon may thus be granted by the President before or after conviction, absolutely or upon conditions, and the ground for its exercise is wholly within the discretion of the President.[56]

Pardon may also be granted, in the form of a proclamation of amnesty, to a whole class of offenders, without any special Congressional authority.[57] President Washington in this way pardoned the participants in the Whiskey Rebellion of 1794;[58] President Adams the Pennsylvania insurgents of 1799;[59] President Madison the so-called Barataria pirates who operated during the War of 1812.[60] President Lincoln also used this means of offering conditional pardon to the rebels in the Civil War;[61] while President Johnson issued four separate proclamations of amnesty and pardon, at first ex-

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[55] *Ex parte Garland*, 4 Wall., 333, 380 (1866); *U. S. v. Klein*, 13 Wall., 128, 139-140 (1871). See also Taft, *Our Chief Magistrate and His Powers*, 119-120; Bascom, *Growth of Nationality*, 120-122; Glenn, *The Army and the Law*, 111.

[56] A striking instance of pardon before conviction is the case of Maj. Gen. Gaines in 1846. Although found guilty by a Court of Enquiry of having violated orders and acted illegally in calling out large bodies of militia and volunteers without authority, and by these acts having greatly embarrassed the government and cost the treasury "many hundreds of thousands of dollars", as the President himself said, nevertheless President Polk refused to convene a court-martial but ordered all further prosecution stopped. *Diary of James K. Polk*, I, 450, 480; II, 82-83. The President has also frequently used his power of pardoning before conviction as a means of securing the return to duty of deserters from the military service. See, for example, General Orders Nos. 43 & 102, July 3, 1866, & Oct. 10, 1873, issued by direction of the President, cited in 20 *Op.Atty.Gen.* 345; also executive proclamations in Richardson,*op.cit.*,VI,163,164, 233,278. For instances of the exercise of the pardoning power after conviction for treason, see McKinney, "Treason under the Constitution of the United States", *Illinois Law Rev.*, XII, 381-402 (Jan.1918).

[57] 20 *Op. Atty. Gen.*, 330.

[58] Proclamation of July 10,1795. Richardson,*op.cit.*,I,181.

[59] Proclamation of May 21, 1800. *Ibid.*, 303.

[60] Proclamation of Feb. 6, 1815. *Ibid.*, 558-560.

[61] Proclamations of Dec. 8, 1863 & Mar. 26, 1864. *Ibid.*, VI, 213-215, 218.

cluding a large number of classes, and finally granting a full and general pardon to all participants in the Rebellion.[62]

The chief significance of the power of pardon lies not only in this that it permits the President to offer clemency at his discretion and to correct acts of injustice done under the stress of war,[63] but that it also enables him practically to neutralize the effect of statutes passed by Congress for a very definite purpose. Thus the Confiscation Acts of the Civil War[64] provided for the confiscation of all property used in aid of the rebellion, and of the property of certain classes in the Confederacy, whether used in aid of the rebellion or not; while the Captured and Abandoned Property Act[65] turned over to the Treasury the proceeds of all property picked up by Federal troops, leaving it to the owner to assert his claim in the Court of Claims on establishing his loyalty. For all these Acts, the Supreme Court held that a pardon operated to purge the claimant of disloyalty,[66] and hence by granting a general pardon the President was enabled to overrule completely the intent of Congress in passing these acts.

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[62] Proclamations of May 29, 1865; Sept. 7, 1867; July 4, 1868; and Dec. 25, 1868. Richardson, op. cit., VI, 310-312, 547-549, 655-656, 708.

[63] The Clemency Board appointed by the President to review court-martial cases adjudged during the recent war passed upon 2,857 cases from Feb. 25 to Apr. 25, 1919, and made a partial or complete remission of the sentences in 91 per cent of the cases considered. N. Y. Times Current Hist. Mag., X, 62 (July, 1919). President Lincoln's generous use of the pardon toward soldiers convicted of purely military offenses is well known.

[64] Acts of Aug. 6, 1861 and July 17, 1862. 12 Stat. at L., 319, 589.

[65] Act of Mar. 12, 1863. Ibid., 820.

[66] U. S. v. Padelford, 9 Wall., 531, 542-543 (1869); U. S. v. Klein, 13 Wall., 128, 142 (1871).

Likewise with respect to such acts as the Espionage Act, passed during the recent war with Germany, the President might, by a general pardon, overcome the purpose of Congress and restore those convicted of disloyalty and obstruction to their full rights as loyal citizens.

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67 Shortly after the signing of the armistice, a strong movement developed for the pardon of the so-called "political prisoners" convicted during the war. See, for example, a pamphlet, "Political Prisoners in Federal Military Prisons", published by the National Civil Liberties Bureau, Nov. 21, 1918. See also The Dial, Jan. 11, 1919, and N. Y. Times, Dec. 26, 1919. In March, 1920, Senator France (Md.) introduced a joint resolution asking that these political prisoners be pardoned. United States Bulletin, Mar. 15, 1920. President Wilson has not yet (April, 1920) issued any such general pardon.

Chapter IX.

Powers of Military Government.

Military government, or the government of occupied territory, is defined as "that dominion exercised in war by a belligerent power over territory invaded and occupied by him and over the inhabitants thereof."[1] Military government in this sense must be carefully distinguished from martial law, in that the former is exercised only in time of war over the inhabitants of an occupied enemy country; while the latter may be instituted during any emergency, whether in time of war or peace, over the citizens at home. Martial law also requires a formal proclamation or declaration before it can be put into effect, while military government exists "simply as a consequence of conquest and occupation."[2]

The authority to institute and exercise military government arises from the right and obligation of the invading belligerent, under the laws of war, to protect his own forces and to guarantee order and security to the inhabitants of the conquered territory.[3] In the United States, that right and that obligation are vested in the President, as Commander-in-Chief, and are exercised under his direction and by his subordinates.[4] "The efficient

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[1] Winthrop, Abridgment of Military Law (2nd ed.), 322; Cf. Birkhimer, Military Government and Martial Law (2nd ed.), 45; Pomeroy, Constitutional Law in the United States (Bennett ed.), 595. Magoon's Reports, 12.

[2] Winthrop, op. cit., 322-323.

[3] See Regulations of Hague Convention respecting the Laws and Customs of War on Land, Art. 43, in Scott, Texts of the Peace Conferences at The Hague, 225.

[4] "Acts of military commanders in conducting the operations of war, and especially in territory in military occupation are by the presumed authority of the commander-in-chief." Finley & Sanderson, The American Executive and Executive Methods, 192; cf. Mechanics Bank v. Union Bank, 22 Wall., 276, 297 (1874).

prosecution of hostilities in war being devolved upon the President as Commander-in-Chief", says Winthrop, "it will become his right and duty (unless Congress otherwise provide) to exercise military government over such portion of the country of the enemy as may pass into the possession of his army by the right of conquest."[5]

Chief-Justice Chase has likewise defined military government as military jurisdiction "to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states and districts occupied by rebels treated as belligerents; . . . by the military commander under the direction of the President, with the express or implied sanction of Congress."[6]

The powers of the President with respect to military government are practically absolute, being limited, neither by the Constitution and laws of the United States nor by the laws of the country under occupation, but solely by the laws and usages of war. "It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law -- the law of war" -- that governs a military occupant.[7] As Commander-in-Chief, it is within the jurisdiction of the President to determine when

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[5] Abridgment of Military Law, 324.

[6] Ex parte Milligan, 4 Wall., 2, 141-142 (1866).

[7] Dow v. Johnson, 100 U. S., 158, 170 (1879). "In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace." New Orleans v. The Steamship Company, 20 Wall., 387, 394 (1874). "The right of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer. We, therefore, do not look to the Constitution or political institutions of the conqueror for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war . . ." Dooley v. U. S., 182 U. S., 222, 230-231, (1901).

the conquest of an enemy territory has been sufficiently completed to warrant or require the institution of a military government;[8] and, in the absence of Congressional action, he may likewise determine the duration of such military occupation and government.[9]

The President may also determine the character of the government to be established over occupied territory; that is, he may, under the laws of war, set up such political institutions and create a government with such powers as he thinks best suited for carrying out the purposes of the military occupation. Thus, during the war with Mexico, President Polk, although he had instructed General Kearney to establish temporary civil governments in the regions conquered by him,[10] disapproved and repudiated his action in organizing a government for New Mexico which gave to that region the status of a permanent territory of the United States and which recognized the inhabitants as United States citizens.[11]

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[8] *Hornsby v. U. S.*, 10 Wall., 224, 239 (1869). Occasionally attempts were made to set up a military government over territory not actually under occupation and control. For example, Andrew Johnson was appointed military governor of Tennessee in March, 1862, when a considerable portion of the state was still unconquered by the Union forces; and General Banks, remarking that "the city of New Orleans is in reality the State of Louisiana", ordered an election held in January, 1864, for governor and other officers for the entire state. See A. H. Carpenter, "Military Government of Southern Territory, 1861-1865," in *Report, Am. Hist. Assn. 1900*, I, 465-498, esp. 477, 478. President McKinley took for granted that the capture of Manila and the surrender of the Spanish forces there "practically effected the conquest of the Philippine Islands", and therefore, on Dec. 21, 1898, ordered the extension of the military government theretofore maintained only in the city of Manila to the entire archipelago. Richardson, *op. cit.*, X, 219.

[9] *Neely v. Henkel*, 180 U. S., 109, 124 (1901); Birkhimer, *op. cit.*, 21, 368.

[10] Thomas, *History of Military Government in Newly Acquired Territory of the United States*, 101-102.

[11] Message to Congress, Dec. 22, 1846. Richardson, *Messages and Papers of the Presidents*, IV, 507; see also *Diary of James K. Polk*, II, 282. For description of the government set up by Gen. Kearney in New Mexico, see Thomas, *op. cit.*, 103-105.

However, in spite of this expressed disapproval of the principle upon which the military government had been organized in New Mexico, the President apparently made no change in the machinery or institutions set up there by General Kearney. Moreover, he expressed no disapproval of the similar territorial government organized in California by Commodores Sloat and Stockton;[12] and certainly approved that established in March, 1847, by General Kearney, which, although not a territorial government in name, in fact practically annexed California to the United States as permanent territory, the inhabitants having been absolved from all allegiance to Mexico and considered as citizens of the United States.[13]

During the Civil War, military governments were also established by the President in the occupied portions of the South, and his right to do so was upheld by the Supreme Court on the ground that the conflict, "though not between independent nations, but between different portions of the same nation, was accompanied by the general incidents of an international war."[14] In fact, one writer has well described the Civil War as "a broadening drama of military occupation, successive governments being established as the Confederacy gave way."[15]

The governments established were of a peculiar character, however, in that they were not strictly military governments in the

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[12] Thomas, *op. cit.*, 160-162, 165, 181. However, the President was not aware of the action taken in California when he sent his message to Congress; and his disapproval of the Stockton government may be assumed from his ignoring that regime in his later instructions to Gen. Kearney to take charge in California.

[13] *Ibid.*, 193-195. In October, 1847, the President expressed himself as favoring an open avowal that New Mexico and California should be retained by the United States, and that permanent territorial governments should be established. *Diary of James K. Polk*, III, 190.

[14] *Dow v. Johnson*, 100 U.S.,158,164 (1879);cf.*Coleman v.Ten.*, 97 U.S.,509,517 (1878).

[15] Glenn, *The Army and the Law*, 97.

sense in which that term is used in international law, instituted to afford protection for the occupying forces and a temporary authority for the enemy inhabitants. They involved the creation of an office not hitherto known in American constitution law -- that of military governor;[16] and they were instituted not for the ordinary purposes of a military occupation, but with the avowed purpose "to re-establish the authority of the Federal Government . . , and to provide the means of maintaining the peace and security to loyal inhabitants . . . until they shall be able to establish a civil government."[17] With this end in view, the old state governmental machinery was gradually restored and placed in the hands of the loyal inhabitants of the occupied districts, new institutions were created where thought necessary, and new state constitutions, designed to be permanent, were required to be framed and adopted -- all of which was upheld by the Supreme Court as a legitimate exercise of the President's power, under the laws of war, to institute military governments.[18]

During the Spanish-American War, military governments were, by order of President McKinley, established in the Philippines,

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[16] The "military governors" appointed during the Civil War were commissioned as such, and were distinct from the commanding officer of the occupying forces. They were generally selected from civil life, but for the occasion were given military rank, commonly that of Brigadier General. Previous to this, no "military governor" had ever been appointed, the commanding officer of the occupying forces merely assuming the duties of governor by virtue of his rank as the superior officer in the territory concerned.

[17] Statement of Secretary of War Stanton, quoted by A. H. Carpenter, op. cit., 478.

[18] "So long as the war continued it cannot be denied that he might institute temporary governments within insurgent districts, occupied by the national forces, or take measures, in any state, for the restoration of State governments faithful to the Union, employing, however, in such efforts, only such means and such agents as were authorized by constitutional laws." Texas v. White, 7 Wall., 700, 730 (1868).

in Porto Rico, and in Cuba, at first pretty strictly of the character contemplated by the laws and usages of military occupation; that is, merely temporary governments set up by the military commander for the protection of the occupying forces and the security of the inhabitants.[19] In Porto Rico, however, some changes were made in the political and judicial system that were not required by military necessity, and the government is said to have been administered, even before the treaty of peace was signed, "as though the island were a permanent possession of the United States";[20] while the later anomalous government for the Philippines was presaged by the sending of a commission to the islands, appointed after the signing but before the final ratification of the treaty, with instructions to "study attentively the existing social and political state of the various populations, particularly as regards the forms of local government, the administration of justice, the collection of customs and other taxes, the means of transportation, and the need of public improvements."[21]

Having therefore the power, as Commander-in-Chief, to institute such a temporary government for occupied territory as he may see fit, the President may also perform all the necessary functions of that government, whether executive, legislative, or judicial.[22] He has, in the first place, complete control over the appointment

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[19] See instructions of President McKinley to the Secretary of War, issued May 19, July 13, & Dec. 21, 1898. Richardson, op. cit., X, 208-211, 214-216, 219-221.

[20] Thomas, op. cit., 307.

[21] The commission consisted of Jacob G. Schurman, Admiral Dewey, Maj. Gen. Otis, Charles Denby, and Dean C. Worcester. See the President's instructions to the Secretary of State, Jan. 20, 1899. Richardson, op. cit., X, 222-223.

[22] Cross v. Harrison, 16 How., 164, 190 (1853); Leitensdorfer v. Webb, 20 How., 176, 177-178 (1857); The Grapeshot, 9 Wall., 129, 133 (1869); Root, Military and Colonial Policy of the United States, 252.

and removal of officers for that government. He may continue in office such of the local officials as he sees fit, or he may remove them at his discretion and appoint a new set of officials, who, upon the sole authority of the President, supersede the existing officials and administer the government under his direction.

Thus, President Polk, in his instructions to General Kearney with regard to the governments to be established by him in New Mexico and California, urged him "to continue in their employment all such of the existing officers as are known to be friendly to the United States, and will take the oath of allegiance to them";[23] and President McKinley similarly instructed the Secretary of War in 1898, that judges and other officials of justice in the occupied territories should continue in office, if they accepted the authority of the United States and the supervision of the American commander. He reminded the Secretary, however, that under the laws of war, "if the course of the people should render such measures indispensable to the maintenance of law and order", the commander of the occupying forces had the power "to replace or expel the native officials in part or altogether, to substitute new courts of his own constitution for those that now exist, or to create such new or supplementary tribunals as may be necessary."[24]

In the military governments established during the Civil War, on the other hand, the power of removal was exercised extensively, being applied not only to public officials of low and high degree, such as state officers, judges, and mayors; but also to officers of semi-public and even private concerns, such as library officials, officers and professors at state universities, and of-

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[23] Instructions of June 3, 1846. Thomas, op. cit., 102.
[24] Richardson, op. cit., X, 209-210, 215, 220.

ficers of chambers of commerce. Where they were not removed, the officials were "little more than figureheads", strictly subordinate to the military commander, and holding their positions only by his permission.[25]

The officials appointed may be either civilians or military persons, within the discretion of the appointing authority. Thus, the principal officials appointed by General Kearney in New Mexico were all civilians, including a governor, secretary, and three members of the supreme court, although the duties of governor were later performed by military officers;[26] while in California, under similar conditions, the principal officials were military men under both the Stockton and Kearney régimes.[27] The "military governors" appointed by President Lincoln were all civilians, given military rank for the occasion,[28] and there seemed to be a conscious effort to fill most ofthe subordinate offices also with civilians. However, many of the commanding officers exercised the functions of a military governor, by virtue of their rank, in the territory oc-

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[25] A. H. Carpenter, op. cit., 481.

[26] Charles Bent, appointed governor by Gen. Kearney, was killed in an insurrection, Jan. 19, 1847. Secretary Vigil, who thereupon became acting governor, was appointed governor Dec. 17, 1847, by the military commander, Col. Price, and served till Dec. 11, 1848, when the duties of "civil and military governor" were assumed by Col. J. M. Washington, by virtue of his rank as commanding officer. He was in turn succeeded Oct. 23, 1849, by Col. John Munroe, who served till the end of the military regime. Thomas, op. cit., 115-116, 128.

[27] Col. John C. Fremont acted as governor for a short time under appointment from Stockton; while under Kearney the principal offices were filled as follows: governor, Col. R. B. Mason; secretary of state, Lt. H. W. Halleck (later famous as a Civil War general and as a writer on international law); collector of customs, Capt. J. L. Folsom. Col. Mason was succeeded by Brig. Gen. Riley, who served till the organization of the state government. Thomas, op. cit., 181; Winthrop, op. cit., 324-325.

[28] Andrew Johnson was commissioned military governor of Tennessee, with rank of Brigadier General; likewise John S. Phelps of Arkansas; Edward Stanly of North Carolina; and George F. Shepley of Louisiana.

cupied by the forces under their command. During the period of the war with Spain, President McKinley placed the military governments established by him in charge of the commanding officers and their military subordinates, gradually supplanting them with civilians after the United States had acquired permanent possession.[29]

These powers of appointment and removal may be exercised, as has been noted, either by the President directly, or through the commanding officer or other subordinate with due authority in the occupied district. Usually the commanding officer assumes the duties of a military governor by virtue of his rank, without any special appointment as such. In other cases, as in the military governments established in the South, a military governor was appointed by the President for each particular occupied district, distinct from the commanding officer in that region; while again, as in New Mexico and California, the functions of commanding officer and military governor have been performed, sometimes by different persons, sometimes by the same person. As a general rule, where the government is presumed to be strictly military in character, the President has left the appointment of the officials in active charge

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[29] Maj. Gen. Wesley L. Merritt set up a military government in the city of Manila immediately upon its capture and occupation on Aug.13,1898, which military government was later extended to the whole archipelago by his successor, Maj. Gen. E. S. Otis, acting under the direct order of the President. Gen. Otis was succeeded on May 5, 1900, by Maj. Gen. Arthur MacArthur, who was in turn succeeded on July 4, 1901, by Maj. Gen. A. R. Chaffee. Porto Rico was occupied by forces under Gen. Nelson A. Miles, July 25, 1898, but a military government was first formally established Oct. 18, by Maj. Gen. John R. Brooke. He was succeeded on Dec. 9, 1898, by Maj. Gen. G. V. Henry, and on May 9, 1899, by Brig. Gen. G. W. Davis. In Cuba, a formal military government for the whole island does not appear to have been set up till Dec. 13, 1898, when a Division of Cuba was created, with Maj. Gen. Brooke as commander and military governor. He was succeeded in Dec., 1899, by Maj. Gen. Leonard Wood.

to the commanding officer, who may even then select either civilians or military persons. Thus, when Secretary Vigil became acting governor in New Mexico after the death of Governor Bent, and besought the Washington authorities to appoint a successor, Secretary of War Marcy replied that the government being purely military, the appointment of a governor would be left to the commanding officer (Colonel Price).[30]

While the President's power with regard to the government of occupied territory is therefore justly said to be "necessarily despotic", it has been held that this applied only to his executive or administrative power, and not to his power to legislate for that territory. "His power to administer would be absolute", says the Supreme Court, "but his power to legislate would not be without certain restrictions -- in other words, they would not extend beyond the necessities of the case."[31] However, it seems to be within the power of the President, as Commander-in-Chief, to judge of the "necessities of the case", hence the restriction amounts in practice to very little.

The President has the power, directly or through his subordinates, to issue orders for the government of a conquered territory, at least until Congress has acted, and these orders have the force of law.[32] Although definite affirmative action on the part of the President or the military commander is required in order to change the local municipal law of the conquered territory, he may, if he thinks necessity demands such a step, abolish entirely the laws of that territory and substitute laws and regulations of his

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[30] Thomas, op. cit., 123.

[31] Dooley v. U. S., 182 U. S., 222, 234 (1901); cf. Moore's Digest, 271; Raymond v. Thomas, 91 U. S., 712, 716 (1875).

[32] Cross v. Harrison, 16 How., 164, 190 (1853).

own making, or he may supplement the local municipal law with such regulations as he may deem necessary and proper.[33]

President Polk in 1846 thus defined the principles to which the laws adopted for a conquered territory should conform, when he declared to Congress that "such organized regulations as have been established in any of the conquered territories for the security of our conquest, for the preservation of order, for the protection of the rights of the inhabitants, and for depriving the enemy of the advantages of these territories while the military possession of them by the forces of the United States continues, will be recognized and approved."[34] Accordingly, although at that time he disapproved the attempt to give New Mexico the status of a permanent territory of the United States, as has been noted, the President apparently accepted and approved the action of General Kearney in adopting an organic law for that region, copied from the organic law of Missouri Territory,[35] and in putting into effect numerous other laws, compiled from neighboring state and territorial laws and from the laws of Mexico.[36] In California, on the other hand, the legislative council established under the Stockton government was ignored and omitted in the government set up by General Kearney un-

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[33] "Until he acts, it is presumed that he intends to leave it of full effect." Glenn, The Army and the Law, 101, n.; Coleman v. Tennessee, 97 U. S., 509, 517 (1878); President McKinley, in 1898, ordered that the rule of international law which required that the municipal law of the conquered territory should be considered as remaining in force, so far as compatible with the new order and until suspended or superseded by the occupying belligerent, be adhered to as far as possible. Richardson, op. cit., X, 209. Cf. Winthrop, op. cit., 323; Davis, Treatise on the Military Law of the United States, 300-301.

[34] Message of Dec. 22, 1846. Richardson, op. cit., IV, 507.

[35] It was, for example, under the provisions of this "organic law" that Secretary Vigil became acting governor of New Mexico upon the death of Governor Bent in January, 1847.

[36] Thomas, op. cit., 103-105.

der instructions from the President,[37] and the orders of the military governor therefore continued there to be the only source of law.

In the occupied districts of the South, elections were conducted under regulations prescribed by the military governor, conventions were held under his supervision, and the constitutions and governments created thereby were inaugurated under his authority. For example, General Banks ordered an election held in Louisiana in January, 1864, for governor and other officers, with the regulation that those entitled to the rights of United States citizens would be required to participate, "indifference" to be treated as a crime and "faction" as treason. Governor Shepley, in the same state, later ordered an election for delegates to a constitutional convention, for which he decreed the registration of all loyal citizens, determined the ratio of representation in the convention, and supervised the registration and election officers in their work. In Arkansas, elections held under the revised constitution were set aside under authority from President Lincoln, new elections were held, and new officers inaugurated; while in Tennessee also, the confirmation and approval of the military governor was apparently necessary, not only for the holding of elections, but in order that persons duly chosen might act.[38]

This military supervision and control of elections extended during the Civil War even to the occupied districts in the border states which were, strictly speaking, not subject to military government and whose constitutional rights were pronounced as "theoretically equal to the rest of the Union". Thus, in various places in Kentucky orders and proclamations were issued by the military autho-

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[37] Thomas, op. cit., 181.
[38] A. H. Carpenter, op. cit., 478, 482.

rities, by which army officers were required to see that none but loyal persons voted or were candidates at the elections, or acted as election officers: in Missouri "voting contrary to orders" was declared to be a military offense; and in Maryland provost-marshals were ordered to "assist" election judges in administering the oath of allegiance and in reporting those who failed to carry out the regulations. "In this way the military became the judge and interpreter of the civil authorities and even of the laws themselves."[39]

The President may likewise exercise complete control over the municipalities within the occupied territory. He may, through the proper subordinates, "change or modify either the form or the constituents of the municipal establishments; may, in place of the system and regulations that formerly prevailed, substitute new and different ones."[40] Thus, during the Civil War, this municipal control extended to the founding of courts, legislation concerning property, the establishment of bureaus in charge of various city activities, the enforcement of a system of licenses, the appointment and removal of officials, the creation of police forces, and the censorship of newspapers.[41]

Numerous other powers with regard to the government of occupied territory that are legislative in character may also be exercised by the President. He may provide the finances necessary for the support of the occupying forces and the expenses of the administration of the territory by the levying of military contributions, the collection of the regular taxes, and the imposition of

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[39] A. H. Carpenter, op. cit., 482-483.

[40] Attorney-General Griggs to the Secretary of War, July 10, 1898. 22 Op. Atty. Gen., 527, 528.

[41] A. H. Carpenter, op. cit., 493-496; cf. Garner, Reconstruction in Mississippi, 38.

customs duties,[42] his judgment as to the propriety of such measures being necessarily arbitrary and absolute.[43] He may likewise promulgate measures for the regulation of trade and intercourse with the occupied territory;[44] establish and maintain telegraph and railroad lines, even though their business conflict with the vested rights of private companies;[45] grant licenses and enter into contracts whose provisions are binding even after the termination of the military occupation;[46] and restrict the right of private ownership.[47]

The judicial powers of the President in occupied territory are also extensive. He has complete control over the establishment, jurisdiction, and functioning of the military courts, such as courts-martial, provost courts, and military commissions.[48] In addition, the President may exercise supervision over civil courts already in existence,[49] or he may create such civil courts as he deems necessary, displacing or supplementing those already existing. Thus, in New Mexico General Kearney established a complete judicial system, consisting of a superior or appellate court and district

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[42] Lawrence, *Principles of International Law*, 445; Richardson, *op. cit.*, IV, 570-572, 672-678; Winthrop, *op. cit.*, 326; *Dooley v. U. S.*, 182 U. S., 222, 231-233 (1901). For view that the President does not have these powers, see *Kent's Commentaries*, I, 292, quoted in Moore's *Digest*, VII, 270.

[43] *Dow v. Johnson*, 100 U. S., 158, 165 (1879); *Herrera v.U.S.*, 222 U.S., 558, 571 (1912). During the Mexican War, President Polk at first gave Scott and Taylor discretionary authority to exact contributions, but neither having done so, he later made his orders "peremptory and stringent" that such exactions should be made. *Diary of James K. Polk*, III, 156. Gen. Scott is said to have collected contributions of about $22,000 from 19 Mexican states. Winthrop, *op. cit.*, 326.

[44] Birkhimer, *op. cit.*, 272; *Fleming v. Page*, 9 How., 603, 615 (1849); cf. A. H. Carpenter, *op. cit.*, 489-493.

[45] *23 Op. Atty. Gen.*, 425; Magoon's *Reports*, 391-407.

[46] *New Orleans v. Steamship Company*, 20 Wall., 387, 394-395 (1874); *23 Op. Atty. Gen.*, 551, 559-563.

[47] Moore's *Digest*, VII, 264; *For. Rel. 1901*, App., 97.

[48] *Supra*, ch. VIII.

[49] See A. H. Carpenter, *op. cit.*, 484-485.

courts, and defined their jurisdiction.[50]

During the Civil War, provost courts were established by the military commanders in New Orleans and elsewhere, with civil and criminal, as well as military jurisdiction, and supplanting in many cases the lower state courts and the local police courts. President Lincoln himself, by executive order of October 20, 1862, created a provisional court for Louisiana, which has been described as "the Alpha and Omega of justice for Louisiana". In this order the President appointed the judge (Charles A. Peabody), and gave the court jurisdiction over "all causes, civil and criminal, including cases in law, equity, revenue, and admiralty, and particularly all such powers and jurisdictions as belong to the district and circuit courts of the United States". He also prescribed the rules of procedure; made the decisions of the court "final and conclusive", with appeals forbidden; and vested in it the power to appoint the prosecuting attorney, marshal, and clerk. While the state laws in force were to be administered by this court "as far as possible", the orders of the military commanders were recognized as of "paramount authority".[51]

All of these acts of the President were upheld by the Supreme Court in several decisions,[52] and his power, as Commander-in-Chief, to organize and practically to control the judiciary in

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[50] Winthrop, op. cit., 325.

[51] A. H. Carpenter, op. cit., 485-486.

[52] Leitensdorfer v. Webb, 20 How., 176 (1857); The Grapeshot, 9 Wall., 129 (1869); Burke v. Miltenberger, 19 Wall., 519 (1873); Mechanics Bank v. Union Bank, 22 Wall., 276 (1874).

territory under military occupation, was clearly affirmed,[53] with only the limitation that neither the President nor any military commander can establish a court in such occupied territory to adjudicate prize cases or to administer the law of nations.[54]

Since all the powers and functions of military government are therefore concentrated in the hands of the President, with scarcely any limitation, it would not seem to be an exaggeration to characterize such government as "an absolutism of the most complete sort."[55]

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[53] "When enemies' territory is occupied, or territory to which the rules of law assign that name, though it be that of a State of the Union, the President can replace its courts by courts of his own, exercising both civil and criminal jurisdiction, and disposing of life, liberty, and property, not as instruments of the judicial authority of the United States, but as instruments of the executive authority." Baldwin, Modern Political Institutions, 103.

[54] Jecker v. Montgomery, 13 How., 498, 515 (1851).

[55] A. H. Carpenter, op. cit., 496; Willoughby, On the Constitution, I, 390.

III. CIVIL POWERS IN TIME OF WAR.

Chapter X.

Control of Administration.

It has been pointed out by a distinguished authority how the original American conception of executive power was to the effect that the President had been vested with military and political, rather than administrative power; and further, how that conception has changed, so that now the President is generally recognized, through powers conferred by statute and derived from the Constitution itself, as "not merely the political head of the United States national government but as well the head of its administrative system."[1]

This position of the President naturally becomes especially important in time of war, when the exigencies of the situation require the creation of additional governmental agencies and a vast expansion in the general field of administration. Through his constitutional powers of appointment, removal, supervision, and direction, the scope of the President's administrative authority is at such a time automatically extended, if his specific powers are not actually increased.

In addition, Congress at such a time is inclined to recognize the wisdom of Hamilton's arguments for a vigorous and unified Executive,[2] and to entrust exceptional administrative control to the President. That is particularly true with regard to administrative agencies created to meet the special military needs of the country. Thus the actual administration of the Draft Acts of the

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[1] Goodnow, Principles of the Administrative Law in the United States, 73-82.

[2] See The Federalist, No. 69 (70),(Goldwin Smith ed.,p.386ff.)

Civil War[3] was given over to the President, although hedged about with such an amount of statutory detail as to leave him with little discretionary authority. The work of administering the provisions of the draft was carried out through a Provost Marshal General, and through enrollment boards, one for each district into which the United States was divided. Each such board was to be composed of the provost-marshal for the district, a licensed physician, and one other person, to be appointed by the President. Their duties, however, were definitely defined by statute, hence the President's authority was principally such as resulted from his control over the personnel of the administrative machinery and from his general powers of supervision.

The Selective Service Act of the recent war[4] went much further in entrusting the President with large powers of administration. The act provided for the registration of all male persons between the ages of 21 and 30 (later extended to include all between the ages of 18 and 45[5]), but gave the President complete authority to designate the time and place for such registration, and to prescribe the rules and regulations in accordance with which it should be held. Under this provision, President Wilson issued no less than thirteen separate proclamations, designating the various times and places for the registration.[6] He likewise issued detailed regu-

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[3] Acts of Mar. 3, 1863, Feb. 24, 1864, & July 4, 1864. 12 *Stat. at L.*, 731; 13 *ibid.*, 6, 390.

[4] Act of May 18, 1917. Public No. 12, 65 Cong., in Wigmore, *Source-Book of Military Law and War-time Legislation*, 460-468.

[5] Act of Aug.31,1918. Public No.210,65 Cong.,*Ibid.*,471-474.

[6] Proclamations of May 18, June 27, June 30, July 2, 1917; May 20, June 11, June 17, June 18, Aug. 13, Aug. 31, Sept. 18, Oct. 10 (2). *U.S.Stats.*,65 Cong.,1Sess.,Proclamations,20,30,35,36;*ibid.*,2 Sess.,137,149,152,155,190,196,207,212,216. So many proclamations were issued for the reason that different registration dates were designated for the various parts of the territory of the United States. Thus June 5, 1917, was named as the first registration day in continental United States (except Alaska), July 5 in Porto Rico,

lations for the execution of the registration provisions of the act.

These regulations created an administrative system, consisting of the Provost Marshal General as the chief administrative officer; the governor and adjutant general of each state as his principal assistants; a board of registration for each county or corresponding subdivision, consisting of three members named by the governor (or by the mayor in cities of over 30,000 population), none of whom were to be in any way connected with the military establishment; and one or more registrars for each voting precinct. These Presidential regulations further defined the jurisdiction and duties of these various officials in connection with the registration; prescribed the compensation of the registrars; and outlined in detail the forms and methods under which the registration should take place.[7]

The local administration of the conscription provisions of the Selective Service Act was carried out through local and district boards, appointed by the President; the former, one for each county or corresponding subdivision, consisting of three or more members, none of whom was to be connected with the military establishment;[8] the latter, one or more for each Federal judicial district, composed of such number of members, likewise civilians, as the President might determine. The duties of these boards were outlined in the act; but the President was authorized to prescribe the rules and regulations under which the boards should operate, to make rules and regulations governing their organization and procedure,

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July 2 - Sept. 2 in Alaska, and July 31 in Hawaii; similarly with respect to the days later named under the amendatory acts of 1918.

[7] See Registration Regulations, issued as a separate pamphlet by the Government Printing Office, 1917.

[8] As a general rule, the Registration Boards were reconstituted the Local Boards.

and to make "all other rules and regulations necessary to carry out the terms and provisions of this section."[9]

Accordingly, President Wilson, on June 30, 1917, issued regulations, describing in detail the organization, duties, and procedure of the local and district boards;[10] and on November 8, 1917, further regulations, covering in detail the jurisdiction of the official boards and auxiliary organizations, the rules and principles governing the classification of the men, the process of selection, the procedure of induction and mobilization, forms to be observed, and the like.[11] The boards were subject to the immediate supervision of the Provost Marshal General and, finally, of the President, who was empowered to "affirm, modify or reverse" any decisions made by them. It is thus clear that while the administrative machinery of conscription was provided for and barely outlined by statute, its creation, supervision, method of operation, and control were in the hands of the President.

With regard to the field of general administration, no additional powers of importance were given to the President in previous wars, beyond his ordinary powers of supervision and direction over the various executive departments and agencies. On the other hand, something was done during the Civil War to provide a Congres-

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[9] Selective Service Act, Sec. 4, Wigmore, op.cit., 463-465.

[10] Rules and Regulations Prescribed by the President for Local and District Boards, issued by the Government Printing Office, 1917.

[11] Selective Service Regulations. A second edition of these, revised and enlarged, was issued Sept. 16, 1918, in which was included, for example, the famous "work or fight" rules. It is worthy of note that the Selective Service Act itself covers only 8 pages; while the Registration Regulations constitute a pamphlet of 30 pages, the Rules and Regulations for Local and District Boards one of 84 pages, and the two editions of the Selective Service Regulations booklets of 254 and 432 pages, respectively.

sional check on the President's administration of the war through the committee of Congress known as the Joint Committee on the Conduct of the War.[12]

The nature and extent of the recent world war, however, called for the creation of numerous new administrative agencies, and it is worthy of note that Congress, in providing for these, in almost every instance gave the President blanket authority to work out the administrative details -- to create the necessary offices, to prescribe the character of their organization, and to determine upon the administrative methods to be used. Thus, the Espionage Act, although providing for the control of exports from the United States, created no administrative agency to exercise such control, but merely specified that the export trade be carried on "under such regulations and orders, and subject to such limitations and exceptions as the President shall prescribe."[13]

Likewise, the Food and Fuel Control Act set up no administrative machinery, but authorized the President "to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act", and further, "to create and use any agency or agencies, . ." for the same purpose.[14] The Trading with the Enemy Act provided for the regulation and control of trading with an enemy or ally of enemy and of the import trade, and for the censorship of foreign communications and foreign-language

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[12] Hosmer, The Appeal to Arms, 80. During the recent war, an attempt was made to set up a similar committee. The Senate added a provision to the Food and Fuel Control bill, establishing a joint committee on war expenditures to be composed of 5 Senators and 5 Representatives,"to safeguard the expenditure of the appropriations bearing upon the war as made by Congress". The vigorous protest of President Wilson against the embarrassment of such a committee forced its abandonment in conference. Pol.Sci.Quar.,XXXII, Supp.,37,38.

[13] Act of June 15, 1917 (Title VII, Sec. 1). Wigmore,op.cit.,493.

[14] Act of Aug. 10, 1917 (Secs. 1 & 2). Ibid., 504.

publications, but empowered the President to "exercise any power or authority conferred by this Act through such officer or officers as he shall direct";[15] while the Railway Control Act provided, "That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine . . ."[16]

By virtue of these provisions, President Wilson vested the executive administration of his instructions and proclamations concerning the export trade in the Secretary of Commerce, and established an Exports Council, composed of the Secretaries of State, Agriculture, and Commerce, and the Food Administrator,[17] "to direct exports in such a way that they will go first and by preference where they are most needed and most immediately needed, and temporarily to withhold them, if necessary, where they can best be spared."[18] As the administrative agencies for carrying out the purposes of food and fuel control, the President created the Food and the Fuel Administrations and the United States Grain Corporation;[19] to administer the provisions of the Trading with the Enemy Act concerning censorship and the regulation of imports, he set up the Censorship Board and the War Trade Board;[20] while for the administra-

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[15] Act of Oct. 6, 1917 (Sec. 5a). Wigmore, op. cit., 548.

[16] Act of Mar. 21, 1918 (Sec. 8). Ibid., 580.

[17] Executive order of June 22, 1917. Official Bulletin, June 26, 1917.

[18] Statement of President Wilson. Ibid. By executive order of Aug. 21, 1917, the Exports Council was enlarged by adding the Chairman of the Shipping Board, and continued as an advisory body; but superseded in its control of exports by the Exports Administrative Board, composed of representatives of the Secretaries of State, Agriculture, and Commerce, the Food Administrator, and the Shipping Board. Willoughby, Government Organization in War Time and After, 128; War Cyclopedia (1st ed.), 90.

[19] Infra, 232-237.

[20] Infra, 228, 239.

tion of the railroads, he established the Railroad Administration, with Secretary of the Treasury McAdoo as Director General of Railroads.[21]

Of all the important administrative agencies established during the recent war to carry on some phase of war activity, very few were expressly created by statute,[22] Congress thus apparently recognizing the importance of entrusting the details of war administration to the President. On the other hand, several war agencies, such as the Committee on Public Information and the War Industries Board, were created by the President without authority of statute, but by virtue of his powers as Chief Executive and Commander-in-Chief.[23]

The establishment of all these new administrative agencies for the carrying on of particular war activities, as well as the tremendous expansion in functions and personnel of the departments and agencies already in existence, soon raised the problem of how to avoid duplication and waste and provide for the proper coordination of effort. It finally came to a point where, in the words of Senator Wadsworth (New York), "It must be apparent to every sensible man that it is utterly impossible to get any teamwork out of this conglomeration of ambitious and scattered agencies, official and unofficial, unless we create some agency that shall guide and con-

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[21] Infra, 245-247.

[22] The Alien Property Custodian was thus created by law. See Trading with the Enemy Act (Sec. 6). Wigmore, op. cit., 548-549. See infra, 242-243. Other administrative agencies of particular importance during the war, such as the Council of National Defense, the War Risk Insurance Bureau, and the Shipping Board, were expressly created by statute, but before the United States entered the war and not anticipating that event. For an account of the work of the first two of these, see Willoughby, Government Organization in War Time and After, 9-21, 339-351; for that of the Shipping Board in relation to this study, infra, 247-248.

[23] Infra, 223-224, 240-241.

trol them all in those matters in which teamwork is essential for the accomplishment of great results."[24]

This general feeling culminated in a proposal by Senator Chamberlain (Oregon), approved by the Senate Committee on Military Affairs, for a war cabinet, to be composed of "three distinguished citizens of demonstrated ability," who were to be appointed by the President with the consent of the Senate, and through whom the President was to exercise "such of the powers conferred upon him by the Constitution and the laws of the United States, as are hereinafter mentioned and described." This war cabinet was to have complete jurisdiction and authority to initiate plans and policies for the prosecution of the war; to direct and procure the execution of these plans and policies; and "to supervise, coordinate, direct, and control the functions and agencies of the Government, in so far as, in the judgment of the war cabinet, it may be necessary or advisable so to do for the effectual conduct and vigorous prosecution of the existing war." The war cabinet was further to be authorized to make the rules and regulations governing its own procedure; to require information from and utilize the services of any or all executive departments, agencies, and officials of the United States and of the several states; and to make all the orders and decisions necessary to carry out these provisions. Besides the right to name its members, the President was to be given over this war cabinet, only a very limited power of review.[25]

The bill thus proposed to confer powers under which this

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[24] Speech in U. S. Senate, Feb. 5, 1918. Cong. Record, 65 Cong., 2 Sess., 1809. See also charts, included in the address, showing the organization and proposed reorganization of the war-making machinery. Ibid., 1808-1810.

[25] The war cabinet bill was introduced by Senator Chamberlain, Jan.21,1918. See text of bill in Cong.Record,65 Cong.,2 Sess.,1077-1078.

new war cabinet, as one Senator said, "could take absolute charge of the conduct of the war. The President would not have the authority to initiate or formulate any plans or policies for its prosecution. His power as Commander-in-Chief would be destroyed. He would be subject to the orders of the War Cabinet".[26] President Wilson therefore vigorously opposed this proposal, saying that it "would involve long additional delays and turn our experience into mere lost motion",[27] and instead he secured the introduction, and finally the passage, of a bill containing his ideas for meeting the situation.[28]

This so-called Overman Act authorized the President "for the national security and defense, for the successful prosecution of the war, for the better utilization of resources and industries, for for the more effective administration by the President of his powers as Commander-in-Chief of the land and naval forces", to make such redistribution of functions among the executive agencies as he might deem necessary; to utilize, coordinate, or consolidate any existing executive or administrative agencies; to transfer any duties or powers, together with any portion of the personnel and equipment, from one such agency to another; and to make whatever regulations and issue whatever orders might be necessary to carry out these provisions. The President was further authorized to es-

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[26] Senator Shields, in U.S.Senate, Apr.22,1918. Cong. Redord, 65 Cong., 2 Sess., 5836.

[27] Statement of Jan. 21, 1918, quoted in Am. Pol. Sci. Rev., XII, 377 (Aug. 1918).

[28] The administration bill was introduced by Senator Overman, Feb. 6, 1918, and became law May 20, 1918. Senator Overman stated very frankly: "The bill was advocated by the President and sent to me by the President, and I have no hesitation in saying so." Cong. Record, 65 Cong.,2 Sess.,(Apr.3,1918),4883. The fight between the advocates of the Overman Bill and Senator Chamberlain's War-Cabinet bill, and the probable motives behind the latter, are described by J.M.Leake,"The Conflict over Coordination",in Am.Pol.Sci.Rev.,XII, 365-380 (Aug.1918).

tablish an executive agency for exercising such control over the production of aeroplanes and aircraft equipment as he might consider advantageous. He had no power, however, to abolish any bureau or eliminate its functions altogether, but was authorized to make such recommendations to Congress in that regard as he might deem proper. Moreover, the act was strictly a war measure, in that it was expressly provided that the authority granted was to be exercised "only in matters relating to the conduct of the present war"; and further, that the act was to remain in force no longer than "six months after the termination of the war by the proclamation of the treaty of peace", all executive agencies and functions at that time reverting to their former status under existing law.[29]

The President was thus, by the terms of this act, given complete control over the administrative machinery of the nation as used for the purposes of the war.[30] The act met with considerable opposition as an unwarranted and dangerous extension of the President's power;[31] while at least one distinguished authority held that it was entirely unnecessary, claiming that the President already had full constitutional power to make such transfers of functions and consolidations of agencies on his own initiative. "I think," said this former Attorney-General and Secretary of State, "the President has the authority to require every executive officer and every department of the Government to do anything that he directs to be done in order to prosecute this war to a successful conclusion. I think he has the power to delegate from one Cabinet officer

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[29] See text of act in Wigmore, op. cit., 586-587.

[30] See an excellent summary by Senator Fletcher of what might be accomplished under this act. Cong. Record, 65 Cong., 2 Sess. (Apr. 22, 1918), 5842.

[31] Especially from Senators Cummins (Rep.), and Reed and Hoke Smith (Dems.).

to another the discharge of any particular duty that he thinks such a Cabinet officer can discharge better than the one upon whom it would normally be incumbent. I do certainly think that the President has all those powers. . . As I have read the Overman bill, in so far as it proposes to authorize the President to utilize and coordinate executive agencies, . . I would not hesitate a second to advise the President of the United States that he now possesses that power."[32]

The majority in Congress felt, however, that the act was not only justified in order to avoid the suspicion or necessity of the President setting himself up as a dictator and doing the same things without definite authority of law,[33] but also that it was necessary to secure the proper coordination of effort on the part of the agencies entrusted with carrying on the various war activities of the government, and was not to be considered as warranting any abuse of power by the President.[34]

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[32] Senator Knox (Rep.), in U. S. Senate, Apr. 3, 1918. Cong. Record, 65 Cong., 2 Sess., 4898; see also ibid., 4903. A leading journal also held that the President's power over administration was practically absolute, and that if he had exercised this power, it would probably not have been questioned in Congress or by public opinion. It said, however, that the Overman Act "would dramatize the President's powers so effectively that no one could question them." The Nation, May 4, 1918.

[33] See Senator Harding's suggestion concerning the need of a dictator. Supra,ch. I, note 29. Senator Overman frequently emphasized the point that instead of exercising questionable powers without authority of law, as was done by President Lincoln, President Wilson had been careful to ask Congress for specific authority to exercise such necessary powers.

[34] Senator Nelson (Rep.) probably best expressed the sentiment of the majority when he said: "This opposition is founded on the assumption that the President from first to last will do nothing but wrong; that he will discontinue and dismantle all the departments instead of the proper assumption that he will utilize them to the best of his ability to carry on the war successfully. . . In order to carry on the transportation of food and supplies to Europe it is necessary to have all these branches of the Government function and work together. That is all there is in this bill, and there is no use of slandering it." Cong.Record,65 Cong.,2 Sess.(Apr.3,1918),4886.

Moreover, there were several precedents for granting such authority as was done by the Overman Act. An act of February 14, 1903,[35] had authorized the President "to transfer at any time the whole or any part of any office, bureau, division, or other branch of the public service engaged in statistical or scientific work from the Department of State, the Department of the Treasury, the Department of War, the Department of Justice, the Post Office Department, the Department of the Navy, or the Department of the Interior, to the Department of Commerce and Labor". The Act of April 28, 1908,[36] authorized the President "for any special occasion" to transfer to the head of another department certain authority conferred upon the Secretary of Commerce; the Act of June 24, 1910,[37] authorized the Secretary of the Navy, with the approval of the President, to transfer the duties of the Bureau of Equipment to the other bureaus and offices of the Navy Department "in such manner as the Secretary of the Navy shall consider expedient and proper"; while by the Act of March 3, 1917,[38] the Bureau of Efficiency was required to investigate duplication of service in the various executive departments and establishments of the Government and make a report to the President, who was authorized, "after such report shall have been made to him, whenever he finds such duplications do exist, to abolish the same." Apparently there was no exercise of the power authorized by this last-mentioned act, for the reason that the Bureau of Efficiency was employed during the war to devise a system for the work of the War-Risk Insurance Bureau and hence had never been able to

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[35] 32 Stat. at L., 830 (Sec. 12).
[36] 35 ibid., 69 (sec. 3).
[37] 36 ibid., 613.
[38] 39 ibid., 1122 (sec. 8).

make the required report to the President.[39]

In addition to the statutes above mentioned, others have been passed applicable to emergencies only, under which the President is authorized at such times to transfer important functions and services. Thus he is empowered, in time of threatened or actual war, to utilize the Public Health and Marine Hospital Service "to such extent and in such manner as shall, in his judgment, promote the public interest"; the Coast Guard, ordinarily a branch of the Treasury Department, may be transferred to the Navy, "in time of war or when the President shall so direct"; and the vessels, equipment, stations, and personnel of the Lighthouse Service and the Coast and Geodetic Survey are subject to transfer by the President to either the War or Navy Department, "whenever in his judgment a sufficient national emergency exists." Numerous acts relating to transfers of employees and officials within the Civil Service have long been on the statute-books; so also regarding the detail of military and naval officers to service with other departments or agencies.[40]

The Overman Act, while going considerably further in its grant of power than anything before enacted, was therefore not entirely novel in its essential principles, especially when considered as a purely war-time measure. Its passage, however, aroused considerable speculation as to the probable action of the President under its authority. Suggestions were thrown out of possible radical changes, such as the setting up of a "War Super-Cabinet" or war council, to consist of such Cabinet members and heads of newly es-

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[39] See Cong. Record, 65 Cong., 2 Sess.(Apr. 3, 1918), 4891.
[40] See complete list of such acts in ibid., 4901.

tablished bureaus as were more immediately concerned with the conduct of the war. Others did not look for any great changes, holding that the Overman Act was to be considered "more as a resource, to be ready at hand as need arises, . . . more as a club than anything else, to bring about better team work, and thus to increase efficiency."[41]

As a matter of fact, no startling changes, transfers, or consolidations were made by the President as a result of the Overman Act, and in no way was the regular Cabinet superseded, or the position of any of the executive departments in the field of administration impaired. President Wilson's first order under the authority of this act, issued on the very day the act went into effect, was perhaps one of the most important. This order provided for the reorganization of the Air Service, which, as a part of the Signal Corps of the Army, had up to this time been under the direction of the Chief Signal Officer.

The powers and functions of that officer were now redistributed as follows: (1) The Chief Signal Officer was left in charge of telegraph and telephone operations. (2) A Director of Military Aeronautics was created and placed in charge of the Aviation Section of the Signal Corps, with the duty of "operating and maintaining or supervising the operation and maintenance of all military aircraft, . . . and of training officers, enlisted men, and candidates for aviation service in matters pertaining to military aviation;" and to that end there was transferred to his jurisdiction every function, power, and duty of the Chief Signal Officer in reference to such military aviation, as also all property

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[41] See article in N. Y. Times, May 5, 1918.

and personnel used in connection with that service. (3) A Bureau of Aircraft Production was established as an executive agency to exercise complete jurisdiction and control over the production of aircraft and aircraft equipment, with the Chairman of the Aircraft Board (which had been created by the Act of October 1, 1917) as its executive officer. He was now designated the Director of Aircraft Production, and was to have complete charge of the activities, personnel, and properties of the said Bureau.[42]

By another executive order of May 28, 1918, the War Industries Board, which had been originally formed as one of the advisory committees of the Council of National Defense,[43] was established as a separate administrative agency to act for the President and under his direction. The functions, duties, and powers of the board were by this order continued as they had been outlined by the President in his letter of March 4, 1918, to the chairman, Bernard M. Baruch;[44] and in its new capacity the War Industries Board became one of the most important factors in coordinating the industrial resources of the nation and thus contributing to the successful conclusion of the war.

The war having been won, President Wilson ordered the War Industries Board to be dissolved January 1, 1919, and certain of its functions transferred to other executive agencies. Thus the powers and functions of the Division of Planning and Statistics were transferred to the War Trade Board, as also the powers of the War Industries Board with respect to any orders, directions, regula-

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[42] Executive Order of May 20, 1918. Official Bulletin, May 21, 1918.

[43] Under authority of the Army Appropriations Act of Aug. 29, 1916. U. S. Stats., 64 Cong., 1 Sess., 619, 650.

[44] Official Bulletin, May 31, 1918. For the letter referred to as outlining the functions of the board, see ibid., Mar. 31, 1918.

tions, or functions that could not, in the opinion of the chairman, be abrogated, complied with, or fulfilled by the 1st of January; while those of the Wool Division were transferred to the Bureau of Markets in the Department of Agriculture. The powers and functions of the Price Fixing Committee were ordered to continue until the prices fixed by the committee should have expired, whereupon all the papers and records should be delivered to the liquidating officer of the War Industries Board, and the committee should stand dissolved. The order further specified that the War Industries Board, or any number of its members and officials might be continued for a limited period after January 1st, if the chairman found that to be necessary for the proper performance of any duty entrusted to him or to the board, but only for the purpose of performing that duty and liquidating the affairs of the board.[45]

Other particularly important orders issued under the Overman Act were those affecting the natural resources of the country. Thus, by executive order of July 3, 1918, the records, personnel, and powers of the Federal Trade Commission relating to the production and distribution of coal and coke were taken from that body and transferred to the Fuel Administration.[46] By another order of July 31, 1918, the President likewise placed the control of the petroleum supply in the hands of the Fuel Administrator, directing,

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[45] Executive Order of Dec. 31, 1918. Official U. S. Bulletin, Jan. 29, 1919. While this executive order dissolving the War Industries Board was specifically based on the Overman Act, the order of May 28, 1918, establishing that board as an administrative agency contained no reference to that act or any other statute, though that authority was evidently presumed. Another executive order apparently issued under authority of the Overman Act, but making no specific reference to it, was that of June 25, 1918, transferring the gas experiment station at American University (Washington, D. C.) from the jurisdiction of the Bureau of Mines to that of the War Department. Official Bulletin, June 28, 1918.

[46] Ibid., July 10, 1918.

however, that such control should be exercised through a Committee on Standardization of Petroleum Specifications, the composition of which was prescribed in the order.[47] Of a similar nature was a later order conferring the control of the mineral resources of the country upon the Secretary of the Interior.[48]

Numerous other executive orders were issued under the authority of the Overman Act, transferring and coordinating various functions and services. On May 31st, all the law officers of the government were ordered to "exercise their functions under the supervision and control of the head of the Department of Justice", excepting only those officers in the Philippines, the Comptroller of the Treasury, and the Judge Advocates General of the Army and Navy;[49] on June 18th, the war housing activities were placed under the control of the Secretary of Labor;[50] and on July 1st, all the sanitary and public health services were concentrated under the supervision of the Secretary of the Treasury, excepting those health functions military in character, exercised by the Surgeons General of the Army and Navy and by the Provost Marshal General.[51]

Finally, to show the great variety in the actions taken under the Overman Act, mention may be made of the executive order of October 3, 1918, transferring $120,000 from the appropriation of $1,620,000 for the censorship of foreign mails under the Post Office Department, and allotting that amount to the Secretary of War

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[47] Official Bulletin, Aug. 7, 1918. This committee was to be composed of 7 members, as follows: a chairman appointed by the Fuel Administrator, one member appointed by the Secretary of War, one by the Secretary of the Navy, one by the chairman of the Shipping Board, one by the Director General of Railroads, one by the Director of the Bureau of Mines, and one by the Director of the Bureau of Standards.

[48] Ibid., Nov. 18, 1918.

[49] Ibid., June 4, 1918.

[50] Ibid., June 20, 1918.

[51] Ibid., July 2, 1918.

for the censorship of the mails in the Panama Canal Zone;[52] and of the executive order of October 22, 1918, by which the President transferred a single individual (W. F. Sloan, of the Division of Program and Statistics) from the Bureau of Aircraft Production to the Post Office Department for such duties as might be assigned to him by the Postmaster General in connection with the control and operation of the telegraph and telephone services.[53]

The excellent results of the "blanket authority" thus conferred on the President with regard to administration in time of war, may be considered to have set a precedent for the future, which will undoubtedly be followed in case of another emergency. As a result, therefore, of his duty to administer and enforce the laws, of his power to nominate, appoint, and dismiss the chief administrative officers, and of the administrative powers conferred by statute, it may fairly be said that the President, in time of war especially, "has become in effect the administrator-in-chief of the Government."[54]

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[52] Official Bulletin, Oct. 10, 1918.
[53] Ibid., Nov. 13, 1918.
[54] Cf. Willoughby, Government Organization in War Time and After, 5-6.

Chapter XI.

Powers of Police Control.

The Bill of Rights is generally considered the most sacred part of the Constitution, especially those portions of it guaranteeing freedom of speech, of the press, and of assembly; security from arbitrary arrest and deprivation of property; and a speedy trial by jury.[1] One of the most important, as well as one of the most perplexing questions that arise in time of war is that of the extent to which these ordinary civil rights of the individual may be restricted in the interest of the public safety and the national defense. Clearly the Constitution is not merely a peace instrument, but was intended to protect the individual in time of war as in time of peace. The doctrine of inter armas leges silent can have no place in a constitutional government;[2] nevertheless it must also be recognized that the guaranty of civil rights cannot apply in the same fashion, nor to the same extent, in time of war as under normal conditions.

One distinguished authority says that "war is a negation

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[1] Amendments, Arts. I, IV, V, VI.

[2] "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." Ex parte Milligan, 4 Wall., 2, 120-121 (1866). However, a committee of the N. Y. Bar Association, at its meeting in Jan., 1917, reported as follows: "In time of war the laws are silent; during the war civil rights may be suspended at the will of the Commander-in-Chief. The Constitution does not inure to the benefit of the public enemy, of spies, or of enemy sympathizers." This position was severely criticized by Dean H. W. Ballantine, of the College of Law in the University of Illinois, in an article, "The Effect of War on Constitutional Liberty", in Case and Comment, XXIV, 3 (June, 1917).

of civil rights", and holds that in its control over the life, liberty, and property of those whom it recognizes as public enemies, Congress is limited "only by the dictates of humanity and a respect for the practice of nations."[3] Another writer contends that the amendments guaranteeing these rights were intended "as declarations of the rights of peaceful and loyal citizens, and safeguards in the administration of justice by the civil tribunals; but it was necessary, in order to give the government the means of defending itself against domestic or foreign enemies, to maintain its authority and dignity, and to enforce obedience to its laws, that it should have unlimited war powers; and it must not be forgotten that the same authority which provides those safeguards, and guarantees those rights, also imposes upon the President and Congress the duty of so carrying on war as of necessity to supersede and hold in temporary suspense such civil rights as may prove inconsistent with the complete and effectual exercise of such war powers and of the belligerent rights resulting from them. . . The rights enjoyed under the constitution in time of peace are different from those to which he is entitled in time of war."[4]

Even if we do not fully accept the contention of these writers that civil rights may be suspended in time of war, still it would seem to be apparent that at such a time these rights must be subject to some modification, restriction, or at least, very

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[3] W. A. Dunning, in Pol. Sci. Quar., I, 178.

[4] Whiting, War Powers under the Constitution, 51. But in his dissenting opinion in the recent case of Abrams v. U. S. (40 Sup. Ct., 17), Justice Holmes declared that the right of free speech is the same in war as in peace, saying, "It is only the present dangers of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned." Cited in Central Law Jour., LXXXIX, 444 (Dec. 19, 1919).

careful supervision, in order that the government may contend successfully with sedition and disloyalty from within as well as against the enemy without; the principle justifying this view being that the rights of the individual must yield to those of the state in the time of the state's peril from a public enemy.[5] Hence there have been developed what may be called the police powers of the President in time of war, that is, the powers exercised by him in restraining and controlling the actions of individuals, whether they be citizens or aliens, within the limits of the country, during a period of war or similar emergency.

The relation of this war power to the rights of enemy aliens who are found within the country after the outbreak of a war is comparatively simple. International law from its very beginning recognized the right of a state to arrest such enemy aliens immediately upon the outbreak of war and detain them as captives during the period of hostilites. Later long-continued practice brought about the rule that a reasonable time for departure should be given before arrest, developing finally into the rule that such aliens should be permitted to remain during the entire period of the war, unless military considerations required their expulsion.[6] The right to arrest or otherwise restrict and govern the conduct of enemy aliens, has, however, never been formally abandoned, and was indeed revived on a wholesale scale by each belligerent during the recent world war.

In the United States, the right of a state under international law thus to regulate and restrict the conduct and move-

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[5] Cf. Glenn, The Army and the Law, 144.

[6] Lawrence, Principles of International Law, 387-389; Hershey, Essentials of International Public Law, 362.

ments of enemy aliens has been definitely vested in the President. An act of Congress passed nearly a century and a quarter ago,[7] designated as alien enemies all male natives, citizens, denizens, or subjects of a hostile nation or government, who were at least fourteen years of age and not actually naturalized; and in 1918 the scope of this act was enlarged so as to include women.[8] The President, by virtue of these acts, is authorized to direct the conduct to be observed on the part of the United States towards these enemy aliens, the manner and degree of the restraint to which they shall be subject, and in what cases and upon what security their continued residence in the United States may be permitted; to provide for the removal of those who are not to be permitted to remain; and "to establish any other regulations which shall be found necessary in the premises for the public safety." In case of removal being ordered, the President is further authorized, at his discretion, to give such reasonable time for departure "as may be consistent with the public safety, and according to the dictates of humanity and national hospitality."

In other words, the President is, impliedly by the rules of international law and expressly by statute, vested with full power to restrict and control the conduct and movements of alien enemies as he may see fit. He may permit them to stay in the United States during the course of a war, with such restrictions upon their conduct as he may deem proper, or with no restrictions; he may order them to depart from the country, and if they refuse or neglect to go, may compel their removal; or he may arrest and intern

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[7] Act of July 6, 1798. Annals of Cong., 5 Cong., III, App., 3753; U. S. Rev. Stats., secs. 4067-4070.

[8] Act of Apr. 16, 1918. U. S. Stats., 65 Cong., 2 Sess., 531.

them for the period of the war. His actions under these powers are final, and in no way subject to judicial review.[9]

Until recently little use seems to have been made of this power. During the war of 1812, aliens were ordered to report their names and obtain "certificates" once a month.[10] Otherwise they have apparently been permitted to remain in the United States with no harrassing regulations governing their conduct and movements. During the recent war with Germany and Austria-Hungary, however, the magnitude of the struggle, involving as it did practically every resource and industry of the nation, and the great number of citizens or subjects of those countries resident in the United States, made the danger from such enemy aliens considerably more serious than ever before.

President Wilson, acting under the authority of the Act of 1798, therefore took precautionary measures immediately upon the entry of the United States into the war, and in the very same proclamation announcing the existence of a state of war,[11] he established a set of twelve regulations governing the conduct of such enemy aliens within the United States. Under these regulations, the possession by enemy aliens of any sort of fire-arm or signal apparatus was prohibited; a barred zone was created around every fort, arsenal, and other government property; attacks or threats of any sort against the government, its measures, policies, or personnel, were not allowed; their residence within any prohibited area that might be designated by the President was not permitted; their departure from and entry into the United States was allowed

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[9] Glenn, The Army and the Law, 87.

[10] Life and Works of John Adams, X, 42.

[11] Proclamation of Apr. 6, 1917. U. S. Stats., 65 Cong., 1 Sess., Procs., 6.

only under such restrictions as the President might prescribe; hostile acts, or acts giving "information, aid, or comfort" to the enemy were of course forbidden; and they were subject, upon suspicion, to summary arrest and internment.

These regulations of April 6 were supplemented by eight additional regulations established in the proclamation of November 16, 1917,[12] which absolutely excluded enemy aliens from such regions as the territorial waters of the United States, the District of Columbia, and the Panama Canal Zone; required them to register; and ordered them to obey such restrictions and regulations upon their residence, occupation, and travel, as the Attorney General might make from time to time. Upon the declaration of war against Austria-Hungary, the scope of these regulations was extended to include the citizens and subjects of that country;[13] and finally, to include the alien women of both Germany and Austria-Hungary.[14]

While the Act of July 6, 1798, supplemented by the Act of April 16, 1918, therefore conferred extensive powers of police control upon the President, there can be no question but that such powers are strictly in line with the accepted rules of international practice, and even without these statutes, might be said to have been vested in the President as the Chief Executive and as Commander-in-Chief.

Somewhat more doubtful are the powers conferred by the

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[12] U. S. Stats., 65 Cong., 1 Sess., Procs., 72.

[13] Proclamation of Dec. 11, 1917. Ibid., 2 Sess., 85.

[14] Proclamation of Apr. 19, 1918. Ibid., 128. On Christmas Day of 1918, these regulations were rescinded, in their entirety as extended to women, and also as applied to men, excepting only the restrictions as to departure from and entry into the United States. Proclamation of Dec. 23, 1918. Ibid., 3 Sess., 274. This proclamation is unique in being done "at the city of Paris, in the Republic of France."

famous Alien Act of 1798,[15] which was passed during the stress of the expected war with France and applied to all aliens, whether from an enemy or a friendly country. By the provisions of this act, the President was authorized to order out of the country "such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable ground to suspect are concerned in any treasonable or secret machinations against the Government thereof." A license to reside within the United States at any place designated by the President might be secured, if the alien concerned could prove, "to the satisfaction of the President", that he was not dangerous to the public safety; but any alien returning to the United States after his removal, unless by permission of the President, was to be imprisoned "so long as, in the opinion of the President, the public safety may require."

This measure thus gave the President practically unlimited police control over all aliens within the United States. Though enacted during a time of technical peace, the Alien Act was designed (together with the Sedition Act) as a war measure, "to afford the President of the United States an effective weapon against what seemed an especially pernicious and dangerous form of domestic opposition in time of war."[16] A great many of the recently admitted foreigners were extreme radicals who "expressed their opinions by speech or pen with a venomous facility that has few counterparts in

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[15] Act of June 25, 1798. Annals of Cong., 5Cong., III, App. 3744.

[16] F. M. Anderson, in Report, Am. Hist. Assn. 1912, 115. "French spies then swarmed in our cities and in our country; some of them were intolerably impudent, turbulent, and seditious. To check them, was the design of the law." Adams to Jefferson, June 14, 1813. Life and Works of John Adams, X, 42. The limitation of the act to two years is also an indication that it was designed purely as a war measure.

these milder times," condemned every magistrate in power in the United States, and whose outpourings could not be looked upon as altogether harmless.[17] There might even be said to have been a precedent for the Alien Act in a similar act passed in Virginia in 1785 and reenacted in 1792, but which, as Madison pointed out, differed in that the Virginia act expressly applied only to enemy aliens in time of actual war.[18]

The powers conferred by the Alien Act were upheld as a legitimate exercise of the war power, in the report of a House committee submitted February 21, 1799, as follows: "The right of removing aliens, as an incident to the power of war and peace, according to the theory of the Constitution, belongs to the government of the United States. . . Congress is required to protect each state from invasion; and it is vested . . . with powers to make all laws which shall be proper to carry into effect all powers vested by the Constitution in the government of the United States, or in any department or officer thereof; and to remove from the country, in times of hostility, dangerous aliens, who may be employed in preparing the way for invasion, is a measure necessary for the purpose of preventing invasion, and, of course, a measure that Congress is empowered to adopt. . . Although the committee believe that each of the measures adopted by Congress (referring also to the Sedition Act) is susceptible of an analytical justification, on the principles of the Constitution and national policy, yet they prefer to rest their vindication on the true ground of considering them as parts of a general system of defence adapted to a crisis of extra-

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[17] Channing, History of the United States, IV, 220.
[18] Writings of James Madison, VI, 369.

ordinary difficulty and danger."[19] Even the bitterest critics of the Alien Act questioned its constitutionality only as it applied to friendly aliens, admitting frankly that "the removal of aliens is an incident to the power of war."[20]

Apparently the power given to the President by the Alien Act was not actually exercised in a single instance;[21] although in a couple of cases final action by the President was probably forestalled only by the voluntary departure of the person concerned, and a considerable number of foreigners are said to have left the country, anticipating the enforcement of the act.[22] On the whole, it is probably correct to say that this law was "neither unjustifiable in purpose nor administered with special harshness."[23]

The power of the President to deal summarily with citizens whom he may consider dangerous to the public safety is not so clear. The provision in the Constitution permitting the suspension of the privilege of the writ of habeas corpus "when in cases of rebellion or invasion the public safety may require it",[24] shows that the taking of extraordinary measures in cases of such emergency was clearly

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[19] Am. State Papers, Misc., I, 182, 183; Elliot's Debates, IV, 441.

[20] See Madison's famous Report of 1800 on the Virginia Resolutions. Writings of James Madison, VI, 366-367.

[21] Life and Works of John Adams, X, 42. President Adams, in at least one instance, expressed a willingness to apply the act. Ibid., IX, 5.

[22] See article by F. M. Anderson, "The Enforcement of the Alien and Sedition Laws," in Report, Am. Hist. Assn. 1912, 115-126, esp. 116-117.

[23] Bascom, Growth of Nationality in the United States, 24; Channing, op. cit., IV, 223-224.

[24] Art. I, Sec. 9, Cl. 2.

recognized as necessary and proper.[25] Although the Constitution itself does not expressly state by what authority the privilege of the writ may be suspended, it had been the general opinion, up to the time of the Civil War, that Congress alone had the power to judge of the exigency requiring that action. This opinion had been induced, not only by the position of the habeas corpus clause in that part of the Constitution devoted to the legislative department,[26] but also by precedent,[27] by the practice under the Constitution,[28] and by the weight of authority.[29]

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[25] There was some objection to this clause at the time. Thus Jefferson in a letter to Madison, July 31, 1788, protested as follows: "Why suspend the Hab. Corp. in insurrections & rebellions? . . If publick safety requires that the government should have a man imprisoned on less probable testimony in those than in other emergencies; let him be taken and tried, retaken & retried, while the necessity continues, only giving him redress against the government for damages. Examine the history of England. See how few of the cases of the suspension of the Habeas Corpus law have been worthy of that suspension. They have been either real treasons wherein the parties might as well have been charged at once, or sham plots where it was shameful they should ever have been suspected. Yet for the few cases wherein the suspension of the hab. corp. has done real good, that operation is now become habitual, & the minds of the nation almost prepared to live under its constant suspension." *Writings of Thomas Jefferson*, V, 46-47.

[26] In the state ratifying conventions it was taken for granted that Congress alone could suspend the writ. The following amendment, for example, was proposed by the New York convention of 1788: "That the privilege of the habeas corpus shall not, *by any law*, be suspended for a longer term than six months, or until twenty days after the meeting of the Congress *next following the passing of the act for such suspension*." Elliot's *Debates*, I, 330.

[27] In England, Parliament, not the Crown, suspends the writ.

[28] President Jefferson's message of Jan. 22, 1807, on Burr's conspiracy, was followed by the passage in the Senate of a bill suspending the writ of habeas corpus in certain cases for three months. In the House the bill was rejected by an overwhelming majority. Neither in the message of the President nor in the discussion in Congress was there any suggestion of the President's right to exercise that power. *Annals of Cong.*, 9 Cong., 2 Sess., 39-43, 44, 402-425.

[29] *Ex parte Bollman*, 4 Cr., 75, 101 (1807); Story, *Commentaries on the Constitution*, II, 208. Cf. Chambrun, *The Executive Power*, 241; Winthrop, *Abridgment of Military Law* (*2nd ed.*), 330-331.

With the outbreak of the Civil War, this settled opinion was disregarded by President Lincoln, acting on his own initiative or through his subordinates, and upon the advice of his Attorney General.[30] On April 27, 1861, he authorized General Scott to suspend the writ of habeas corpus by the following order: "You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington, you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally, or through the officer in command at the point at which resistance occurs, are authorized to suspend that writ."[31]

On May 10, the President by proclamation also authorized the commander of the United States forces on the coast of Florida, "if he shall find it necessary, to suspend the writ of habeas corpus and to remove from the vicinity of the United States fortresses all dangerous or suspected persons";[32] on June 20, he directed General Scott to suspend the writ in the case of a single officer charged with treason;[33] on July 2 and October 14, he extended his order of April 27 to cover the military line from Washington to Bangor, Maine;[34] and on December 2, he empowered General Halleck to suspend the writ at his discretion in the state of Missouri.[35] Finally, by proclamation of September 24, 1862,[36] the President de-

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[30] Attorney General Bates, July 5, 1861. 10 Op.Atty.Gen., 74.

[31] Richardson, Messages and Papers of the Presidents, VI, 18. Only two days before, Lincoln declined to permit Gen. Scott to arrest or disperse members of the Maryland legislature suspected of favoring secession, before the legislature should meet. Ibid., 17.

[32] Ibid., 17.

[33] Ibid., 19.

[34] Ibid., 19, 39.

[35] Ibid., 99.

[36] Ibid., 98-99.

clared that all persons aiding or abetting the rebellion, discouraging enlistments, resisting drafts, or guilty of "disloyal practices", should be subject to trial by court-martial or military commission, and ordered the suspension of the writ of habeas corpus in their cases -- a proclamation which an eminent authority has characterized as "a perfect platform for a military despotism."[37]

While the suspension of the privilege of the writ of habeas corpus does not of itself authorize arbitrary arrests or any unusual procedure in trial, it has that practical effect, since those suffering arbitrary arrest would have no remedy to prevent the continuance of their confinement during the suspension of the writ.[38] Arbitrary arrests were made from the very beginning of the war. Members of the Maryland legislature, the mayor of Baltimore, and several other prominent citizens were arrested by order of the Secretary of War, in order to prevent the passage of an ordinance of secession. Later, wholesale arrests were made all over the country, especially in the West, some by direct authority of the President,[39] some by order of the Secretary of State, some by that of the Secretary of War, sometimes merely by virtue of a simple telegram, and

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[37] W. A. Dunning, in Pol. Sci. Quar., I, 188. "Discouraging enlistments and disloyal practices were offences unknown to the law, and the phrase disloyal practice was large enough to include anything." S. G. Fisher, in Pol.Sci.Quar.,III,457. The elastic interpretation of the latter term is indicated by the following contemporary definition: "He is a public enemy who seeks falsely to exalt the motives, character, and capacity of armed traitors, to magnify their resources, to encourage their efforts by sowing dissension at home, or by inviting intervention of foreign powers in our affairs. He who overrates the success, increases the confidence, and encourages the hopes of our adversaries, or underrates, diminishes, or weakens our own, and he who seeks false causes of complaint against the officers of our government, or inflames party spirit among ourselves, . . . gives to our enemies that moral support which is more valuable to them than regiments of soldiers, or millions of dollars." Whiting, War Powers under the Constitution, 197-198.

[38] Cf. Burgess, The Civil War and the Constitution, II, 216.

[39] See Executive Order of Aug.8,1862. Richardson,op.cit.,VI,121.

in no case with the warrant required by the Constitution, the only justification being that the persons so arrested were, by treasonable speaking and writing, giving aid and comfort to the enemy, and that their imprisonment was necessary for the public safety.[40]

In March, 1863, Congress expressly authorized the President to suspend the writ of habeas corpus and legalized his past acts,[41] but for two years Lincoln had suspended the writ of his own accord, and had made arrests without warrant, holding the suspects as long as he pleased,[42] not only without express authority and contrary to the prevailing opinion of his power up to the time of the Civil War, but in direct opposition to the authoritative ruling of Chief Justice Taney.[43] He was, however, clearly supported by public opinion,[44] and if any constitutional principle can be deduced, it is "that the President may in an emergency exercise the right to arrest and detain individuals until Congress acts."[45] There is scarcely any doubt, as is asserted by an eminent authority, that the practices of the

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[40] Rhodes, History of the United States, III, 553-556; S. G. Fisher, "The Suspension of Habeas Corpus during the War of the Rebellion," in Pol. Sci. Quar., III, 454-488, esp. 457.

[41] Act of Mar. 3, 1863. 12 Stat. at L., 755.

[42] By executive order of Feb. 14, 1862, he ordered the release of all political prisoners on their parole to render no aid or comfort to the enemies of the United States, granting amnesty for their past disloyalty to those who should keep their parole, and declaring that "extraordinary arrests will hereafter be made under the direction of the military authorities alone." Richardson, op. cit., VI, 102-104.

[43] Ex parte Merryman, Fed. Cases No. 9487 (1861).

[44] Cf. S. G. Fisher, op. cit., 483.

[45] See W. A. Dunning, "The Constitution in Civil War", in Pol. Sci. Quar., I, 163-198, esp. 189; cf. Bascom, Growth of Nationality, 112-114. The most notable assertion of the President's power was the pamphlet by Horace Binney, "The Privilege of the Writ of Habeas Corpus under the Constitution", well summarized by S. G. Fisher, op. cit., 459-465. For Lincoln's own defense of his actions, see his message to Congress, July 4, 1861, and his replies to communications from New York and Ohio Democrats, June 12 & June 29, 1863. Richardson, op. cit., VI, 25; McPherson, History of the Rebellion, 163-167, 170-172.

administration in the Civil War would be repeated under like circumstances, and that they are to be considered as the precedent of the Constitution rather than the opinion of the Supreme Court.[46]

With regard to the freedom of speech and press, some restrictions on both have always been considered warranted in spite of the constitutional guaranties, even in time of peace.[47] In time of war, these may be considerably extended so as to prevent interference with the successful prosecution of the war by stirring up disloyalty or sedition, by encouraging disobedience to the laws or by giving aid or comfort to the enemy in any way.[48] In fact, it has been authoritatively asserted that the freedom of the press in war time rests largely with the discretion of Congress.[49]

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[46] "It may therefore be claimed that it is the precedent of the Constitution in Civil War that the President may suspend all the safeguards of the Constitution in behalf of personal liberty anywhere within the country, taking upon himself the responsibility therefor to Congress, and that subsequent authorization by Congress to do the like things in future works indemnification, and makes the preceding Presidential assumptions legitimate and lawful, if they lacked anything of being so before." Burgess, The Civil War and the Constitution, II, 217.

[47] "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this, I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion and on the general spirit of the people and of the government." The Federalist, No. 84 (Goldwin Smith ed., p. 476).

[48] In its decisions upholding the constitutionality of the Espionage Act of 1917, the Supreme Court declared that the first amendment affords no protection to an individual convicted under that act for printing and distributing in time of war a document calculated to cause insubordination in the military and naval forces and obstruction to recruiting; that it likewise is no protection against conviction for publishing and circulating newspapers or articles attempting to cause disloyalty and mutiny; and that it is no valid defense against conviction for delivering a speech opposing the war, so expressed that the natural effect is to obstruct recruiting. Schenck v. U. S., 39 Sup. Ct. Rep., 247; Frohwerk v. U. S., ibid., 249; Debs v. U. S., ibid., 252.

[49] War Cyclopedia (1st ed.), 101.

Such war time restrictions may take the form of penalizing certain kinds of speech or writing. This was the nature of the famous Sedition Act of 1798,[50] which, designed, like the Alien Act already referred to, as a war measure,[51] attempted to curb the spread of sedition during the crisis with France by punishing false, scandalous, and malicious writings against the Government, either house of Congress, or the President, written with intent to stir up sedition. Of a similar nature, but even more clearly designed as a war measure, is the Espionage Act of 1917,[52] of which it has been said that "few more sweeping measures have ever found their way to the national statute book."[53]

As amended in 1918,[54] this act is especially stringent, making it a penal offense, not only to hinder the success of the United States and promote that of the enemy by making false reports, by inciting or attempting to incite disloyalty or mutiny, or by obstructing recruiting and enlistment, but also to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government . . , or the Constitution . . , or the military or naval forces . . , or the flag . . , or the uniform of the Army and Navy of the United States", or any language intended to bring these into "contempt, scorn, contumely,

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[50] Act of July 14,1798. Annals of Cong.,5 Cong.,III,App.,3776.

[51] See report of House Committee, Feb. 21, 1799. Am. State Papers, Misc., I, 182, 183. That the act was designed purely as an emergency measure is further indicated by the fact that it was to continue in effect only until Mar. 3, 1801.

[52] Act of June 15, 1917. Public No. 24, 65 Cong., in Wigmore, Source-Book of Military Law and War-Time Legislation, 484-500.

[53] War Cyclopedia (1st ed.), 88.

[54] Act of May 16, 1918. Public No. 150, 65 Cong., in Wigmore, op. cit., 500-501.

or disrespect". Through his constitutional power to "take care that the laws be faithfully executed", it was of course largely within the discretion of the President to interpret these provisions in such a way as to make them instruments of oppression or geniune attempts to suppress disloyalty and sedition.[55]

Another method of placing war time restrictions on the press is through censorship in advance of publication. *This method is largely executive*. The President, as Commander-in-Chief, has the undoubted power to suppress or censor such newspapers or other publications in occupied territory as he may deem injurious to the public interests.[56] At least one writer asserts that the President also has this power within the United States as well. He says that the power necessarily exists somewhere to prevent disclosures useful to the enemy, should such disclosures be threatened or undertaken, and maintains that "it is of the very essence of all things which lie between success and failure in war that this power should be reposed where it can be exercised instantly, as the exigencies of the situation may develop the need", and that therefore the President is not dependent upon Congress in order to exercise the power of censorship, but has the right, as Commander-in-Chief, to prevent and suppress such publications. "To deny the power is to deny the right of the commander-in-chief to protect his armies against a danger as obvious as would be the danger of allowing armies to organize and drill and accumulate arms and ammunition behind the lines."[57]

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[55] For the enforcement of the Sedition Act of 1798, see F. M. Anderson, op. cit., in *Report, Am. Hist. Assn. 1912*, 118-122. For opinion as to its constitutionality, see Story, *Commentaries on the Constitution*, II, 619, n.

[56] *Dig. Ops. J. A. G.*, (ed.1901), 426.

[57] T.J.O'Donnell,"Military Censorship and the Freedom of the Press," in *Va. Law. Rev.*, V, 178-179.

This power of censorship was both asserted and exercised during the Civil War. Postmaster General Blair stated it as his opinion "that a power and duty to prevent hostile printed matter from reaching the enemy, and to prevent such matter from instigating others to cooperate with the enemy, by the aid of the United States mails, exist in time of war, and in the presence of treasonable and armed enemies of the United States, which do not exist in time of peace, and in the absence of criminal organizations;"[58] which view was sustained in a report of a committee of Congress,[59] and a way thus opened for placing the press "at the mercy of the Government in time of war".

In accordance with these views, a censorship of some sort existed from the outset of the war, though it was apparently never very effective. Government control of the telegraph lines was established as early as April, 1861, and a censor (H. E. Thayer) was appointed, with instructions from Secretary Seward to prevent the issue from Washington of telegraphic messages relating to the civil or military operations of the government, containing anything more than a bare statement of essential facts.[60] In August of the same year, an attempt was made to reach a "gentlemen's agreement" between the government and the press, whereby the newspapers were to refrain from publishing information giving aid or comfort to the enemy, while the government was to afford facilities for the trans-

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[58] Quoted in Burgess, op. cit., II, 222-223.

[59] Report of House Judiciary Committee, Jan. 20,1863.Ibid.,223.

[60] For example, no mention was permitted of the criticism of Gen. Stone for the Ball's Bluff disaster; nor of the fact that some senators had urged the removal of Gen. Sherman; nor of the Cabinet's objections to Secretary Cameron's report. See J. G. Randall, "The Newspaper Problem in Its Bearing upon Military Secrecy during the Civil War", in Am. Hist. Rev., XXIII, 303-323, esp. 303-304 (Jan., 1918).

mission of suitable information.

This proved to be a failure, due to the unscrupulous character of some correspondents and newspapers, and finally resort was had to an administrative policy of news control. The censoring function was transferred from the State to the War Department; military supervision of the telegraph lines was ordered by authority of Congress, beginning in February, 1862; and a special officer was appointed for the general supervision of the telegraph business, with the title of Assistant Secretary of War and General Manager of Military Telegraphs.[61] Under the direction of this officer, regulations were drawn up governing the transmission of news over the telegraph wires,[62] and a general policy of news control was instituted, though the fact that the mails remained open and uncensored made these but half-way measures towards effectively closing the news channels.

There were also some attempts at suppression of newspapers and discipline of correspondents. In August, 1861, Postmaster General Blair ordered certain New York and Brooklyn papers excluded from the mails, and the United States marshal seized copies of one of them -- these papers having been indicted for rebellious utterances;[63] the Baltimore Transcript, the Metropolitan Record, and

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[61] See order of Feb. 25, 1862, taking possession of the telegraph lines and naming Edward S. Sanford as military supervisor of telegraphic messages. The same order specifically forbade telegraphic communications concerning military operations not expressly authorized by the War Department, the commanding General, or the generals commanding in the several departments; newspapers publishing such military news without authority to be excluded from the telegraph service and from the railroads. Richardson, op. cit., VI, 108-109.

[62] For these regulations, see J. G. Randall, op. cit., 305.

[63] These were the Journal of Commerce, the Daily News, the Freeman's Journal, and the Brooklyn Eagle. Burgess, op. cit., II, 222; Cong. Record, 65 Cong., 2 Sess., (Feb. 19, 1918), 2557.

the Cincinnati Enquirer were each suppressed for short periods by generals commanding in the departments in which they circulated; while the New York World and the Journal of Commerce were seized and suppressed for three days in May, 1864, under orders of President Lincoln, for publishing a bogus proclamation implying the admission of a Union disaster. The editor of the Baltimore Exchange, openly sympathetic with secession, was arrested and confined in Fort La-Fayette, but released after some months by order of the War Department; the Chicago Times was suppressed in 1863 by General Burnside, but his action was revoked by the President. Several of the generals, particularly Grant and Sherman, attempted at various times to discipline newspaper correspondents within their lines with varying degree of success.[64]

While the actual governmental interference with the freedom of the press during the Civil War was, on the whole, comparatively slight,[65] the precedent was established that "this part of the Constitution (the first amendment) may be suspended by order of the Administration, when in the judgment of the President the public safety demands it".[66]

With the entry of the United States into the recent world war, the problem of news control again became acute, and on April 13, 1917, Secretary of State Lansing, Secretary of War Baker, and Secretary of the Navy Daniels addressed a joint communication to the President, setting forth their views on the subject. They pointed out the danger in premature or ill-advised announcements of policies, plans, and specific activities, and suggested the need for

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[64] Cong. Record, 65 Cong., 2 Sess., (Feb. 19, 1918), 2557; J. G. Randall, op. cit., 318-321.
[65] Ibid., 322-323.
[66] Burgess, op. cit.,II,223.

some authoritative agency to assume the publication of all the vital facts of national defense. "While there is much that is properly secret in connection with the departments of the Government, the total is small compared to the vast amount of information that it is right and proper for the people to have. . . It is our opinion that the two functions -- censorship and publicity -- can be joined in honesty and with profit, and we recommend the creation of a Committee on Public Information. . . We believe you have the undoubted authority to create this Committee on Public Information without waiting for further legislation, and because of the importance of the task, and its pressing necessity, we trust that you will see fit to do so. The committee, upon appointment, can proceed to the framing of regulations and the creation of machinery that will safeguard all information of value to an enemy, and at the same time open every department of government to the inspection of the people as far as possible."[67]

In accordance with this recommendation and this opinion as to his powers with regard to censorship, President Wilson, by executive order of April 14, 1917,[68] created such a Committee on Public Information, "to be composed of the Secretary of State, the Secretary of War, the Secretary of the Navy, and a civilian who shall be charged with the executive direction of the committee." George Creel was appointed as the civilian chairman, and the Secretaries were authorized to detail an officer or officers to the work of the committee.

Under the direction of the committee so created, a system of voluntary censorship was established. The committee at various

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[67] See text of letter in Official Bulletin, May 10, 1917.
[68] Official Bulletin, May 10, 1917.

times issued "requests" to the press to suppress news with respect to certain matters of military and naval value.[69] These were supplemented from time to time by similar "requests" to the press from the Secretary of War and the Secretary of the Navy,[70] to all of which the press of the country apparently responded to the general satisfaction of the government officials.[71]

In addition to its direction of this voluntary censorship, the policy of news control was further carried out by the Committee on Public Information through its organization of various kinds of publicity services. A daily paper was published, beginning May 10, 1917, in no sense in competition with the regular news journals, but containing "all proclamations and Executive orders issued by the President; rules and regulations promulgated by the Federal departments; official bulletins and statements; statutes bearing on the war and their construction; and all other subjects related to the prosecution of the war, to which publicity may properly be given."[72] Other pamphlets were compiled and issued under the direction of this committee, giving information as to the causes and pur-

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[69] Especially information concerning the train and boat movements of troops, the assembling of transports and convoys, or any information from which inference might be drawn of embarkation for over-seas service. The suppression of the names of armed merchant ships which had engaged U-boats was also requested, in order to save the captains, if later captured, from the fate of Capt. Fryatt. Official Bulletin, June 14, June 15, 1917; May 10, June 10, 1918. On July 30, 1917, the committee published an extended list of matters concerning which it requested secrecy, which list was revised and again strongly urged upon the press on Dec. 31, 1917. Ibid., July 31, Dec. 31, 1917.

[70] Ibid., Apr. 3, May 27, Aug. 2, 1918.

[71] See statements of Secretary Daniels praising the spirit of the American press in adhering to the voluntary censorship. Ibid., Feb. 12, Aug. 2, 1918.

[72] See statement in first number, May 10, 1917. The paper was named the Official Bulletin, later changed to Official U. S. Bulletin. It was suspended as a government publication Mar. 31, 1919, but was continued as a private enterprise, under the name United States Bulletin, published bi-weekly by Roger W. Babson.

poses of the war;[73] news was gathered and disseminated to the newspapers of the country; motion pictures were made and distributed under its supervision; staffs of lecturers were organized; and agencies of various sorts were used to stimulate public opinion and spread information on the issues of the war. All this was done on the sole authority of the President, the committee even operating for a considerable time on the executive budget, but later securing some appropriations from Congress.[74]

Besides this system of voluntary censorship and news control under the direction of the Committee on Public Information, a rigid censorship of letters and other matter sent out from the camps and fields was maintained by the military authorities. In January, 1918, this censorship was by General Order lightened so as to permit soldiers in camp in this country to write freely for publication, subject to censorship by designated officers who were to "delete all references capable of furnishing important information to the enemy." Attention was, however, called to the fact that "criticism of superiors and the spreading of false reports which would tend to injure the military service constitute breaches of military discipline." Matter written by regular newspaper correspondents not in the military service was not subject to any sort of censorship, but the order directed camp commanders to instruct these correspondents "that they must rigidly adhere to the requests

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[73] The so-called War Information and Red, White, and Blue series.

[74] The work and organization of the Committee on Public Information are outlined in Willoughby, Government Organization in War Time and After, 35-39; also in a pamphlet compiled under the direction of H. H. B. Meyer, Chief Bibliographer of the Library of Congress, The United States at War: Organizations and Literature, 79-81. According to a statement by Mr. Creel, the committee received from the President $5,600,000, while from Congress it received but $1,250,000. N. Y. Times, Nov. 1, 1919.

for secrecy with respect to information of value to the enemy, as defined . . . by the Committee on Public Information", violations of these instructions to cause a denial of the privileges of the camp.[75]

In addition to the voluntary and military censorship of newspapers and other publications thus established within the United States on the sole authority of the President, steps were taken early in the war to establish a rigid censorship over the telephone, telegraph, and cable systems. By executive order of April 28, 1917, President Wilson prohibited all companies operating telegraph and telephone lines and submarine cables from transmitting messages to points without the United States and from delivering messages received from such points, except such messages as might be permitted under regulations established by the Secretary of War and the Secretary of the Navy.[76] This sweeping order was based on no other authority than the power vested in the President "under the Constitution and by the joint resolution of April 6, 1917, declaring the existence of a state of war"; in other words, solely upon his authority as Commander-in-Chief.

Under this order, a particularly stringent cable censorship was established. The office of Director of Naval Communications and Chief Cable Censor was created, under whose direction a number of cable censorship regulations were issued May 1, and amended May 31, 1917, with the avowed intention "to ease the situation of the American trader and correspondent abroad, consistent with

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[75] Official Bulletin, Jan. 31, 1918.

[76] Ibid., July 18, 1917. This order was supplemented by a similar order of Sept. 26, 1918, extending the restrictions to messages on or near the Mexican border. Ibid., Sept. 27, 1918.

the objects of military censorship."[77] On July 18, the censorship was extended to all Atlantic cables, and new regulations were promulgated, effective on that date.[78]

Thus far the censorship was carried on solely by virtue of the President's orders. However, the Trading with the Enemy Act of October 6, 1917,[79] included among its provisions one authorizing the President to cause all communications to and from foreign countries by mail, cable, radio, or any other means, to be censored under such rules and regulations as he might establish.[80] President Wilson thereupon, by executive order based upon this act, created a Censorship Board, composed of representatives of the Secretaries of War and Navy, the Postmaster General, the War Trade Board, and the chairman of the Committee on Public Information, to control all such communications.[81]

Under the direction of this board, the cable censorship was tightened, and a great many persons, including some American citizens, were denied the use of the cables altogether.[83] The censorship thus exercised seemed to be based in part on statutory authority, but chiefly on the authority of the President alone, acting in pursuance of his powers as Commander-in-Chief.

In addition to giving the President complete power to censor all communications of every sort between this country and a

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[77] Official Bulletin, June 5, 1917.

[78] Ibid., July 18, July 25, 1917. Up to that time, the cable censorship had extended only to South and Central America, Mexico, and the Orient.

[79] Public No. 91, 65 Cong., in Wigmore, op. cit., 543-561.

[80] Sec. 3, Cl. (d).

[81] Executive order of Oct. 12, 1917. Official Bulletin, Oct. 15, 1917.

[82] See N. Y. Times, Nov. 9, 1917.

[83] Official Bulletin, May 21, 1918. The cable censorship ceased July 23, 1919, by order of the President. N. Y. Times Current Hist. Mag., X, 410 (Sept. 1919).

foreign country, the Trading with the Enemy Act vested him with considerable power over the foreign language press of the United States, requiring these newspapers, except by license from the President, to file before publication a "true and complete" translation of "any news item, editorial, or other printed matter, respecting the Government of the United States, or of any nation engaged in the present war, its policies, international relations, the state or conduct of the war, or any matter relating thereto."[84] Provisions of the Espionage Act had likewise declared non-mailable every sort of publication "containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States."[85]

To the executive authorities charged with the enforcement of these provisions was left the exact determination of what was to constitute such non-mailable matter, and Postmaster General Burleson, in a public statement, defined the position of the Administration as follows: "We shall take care not to let criticism which is personally or politically offensive to the administration affect our action. But if newspapers go so far as to impugn the motives of the Government and thus encourage insubordination, they will be dealt with severely. For instance, papers may not say that the Government is controlled by Wall Street or munition manufacturers, or any other special interests. Publications of any news calculated to urge the people to violate law would be considered grounds for drastic action. We will not tolerate campaigns against conscription, enlistments, sale of securities, or revenue collections. We will not permit the publication or circulation of anything hampering the

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[84] Sec. 19.
[85] Act of June 15, 1917 (Title XII, Sec. 2).

war's prosecution or attacking improperly our allies."[86]

The President's powers of censorship appear therefore to be based in part on his constitutional position as Chief Executive and Commander-in-Chief, in part on definite statutory authority. Through his power to interpret and enforce the statute law, the President is enabled to exercise a considerable measure of control over the expression of opinion in time of war. When to this is added the powers of censorship and control exercised by the authority of the President alone, not only during the recent war but previously as well, the President's power in this regard would seem to be limited in practice only by the extent of the necessity, as judged by him.

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[86] Statement of Oct. 9, 1917, quoted in War Cyclopedia (1st ed.) 163. This was supplemented by another statement to the same effect, issued in a letter of Oct. 22, 1917. See text in Willoughby, Government Organization in War Time and After, 48-49.

Chapter XII.

Powers of Economic Control.

"This is a war of resources no less than of men, perhaps even more than of men", said President Wilson during the course of the recent war;[1] and the extent to which the economic resources of the belligerent nations were placed under government control is one of the most striking and unprecedented features of the world war.

In the United States, it has become a well-established principle of constitutional law that businesses affected with a public interest are subject to government regulation, even in time of peace.[2] It has likewise been long recognized that the property rights of private individuals must yield in time of war to the military needs of the nation. Thus, during the Revolution, dictatorial powers were at various times conferred upon General Washington "to take, wherever he may be, whatever he may want for the use of the army, if the inhabitants will not sell it, allowing a reasonable price for the same."[3] There was some attempt at price-fixing during the same war,[4] and there were many resolutions recommending and

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[1] Statement on taking over the railroads, Dec. 26, 1917. Official Bulletin, Dec. 27, 1917.

[2] German Alliance Ins. Co. v. Lewis, 233 U.S., 389,411 (1914).

[3] Resolve of Dec. 27, 1776. See also resolves of Sept. 17 & Nov. 14, 1777. Jour. Cont. Cong., VI, 1045; VIII, 752; IX, 905.

[4] A resolution of Nov. 22, 1777, recommended that the states enact price-fixing legislation, "in order to introduce immediate economy in the public expence, the spirit of sharping and extortion, and the rapid and excessive rise of every commodity being confined within no bounds"; and a resolution of Jan. 15, 1778, empowered the Board of War to limit the prices to be given for wheat and flour. The repeal of all such price-fixing legislation was recommended June 4, 1778, the resolution declaring that "it hath been found by Experience that Limitations upon the Prices of Commodities are not only ineffectual for the Purposes proposed, but likewise productive of very evil Consequences to the great Detriment of the public Service and grievous Oppression of Individuals." Ibid., IX,957;X,55; XI, 569, 570.

authorizing the "impressment" of supplies of all kinds needed for the army, including "wheat in the sheaf".[5]

The entry of the United States into the world war, requiring the mobilization, not only of the military and naval forces of the nation, but of its every economic resource as well, emphasized the fact that in time of war the constitutional principle of government regulation and control may be extended to cover practically every enterprise and activity within the country; that "the extraordinary circumstances of war may bring particular businesses and enterprises clearly into the category of those which are affected with a public interest and which demand immediate and thoroughgoing public regulation."[6]

Control of Food and Fuel. From the first, it was recognized that the great contribution of the United States to the winning of the war must be the supplying of food for itself and the Allies. Hence a policy of food control was entered upon, centered almost entirely in the hands of the President. Immediately after the declaration of a state of war with Germany, Herbert Hoover was selected (on April 7) by the Council of National Defense as chairman of its committee on food supply and prices,[7] and on May 19 his appointment as Food Administrator and a program of food administration were announced by President Wilson,[8] even though the administration bills vesting the President with powers of food and fuel control had not yet been acted upon by Congress.[9] President Wilson followed this

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[5] Jour. Cont. Cong., III, 323; VI, 1001; VIII, 741; IX, 774-775, 962, 1043; XX, 516, 598.

[6] Statement of ex-Justice Hughes, quoted in War Cyclopedia (1st ed.), 96.

[7] Pol. Sci. Quar., XXXII, Supp., 25.

[8] N. Y. Times, May 20, 1917.

[9] These administration bills were introduced into Congress the latter part of April.

action with a letter to Mr. Hoover on June 12, 1917, in which he stated that the saving of food and the elimination of waste admitted of no further delay, and therefore, without waiting for the legislation which he considered desirable, he vested Mr. Hoover with "full authority to undertake any steps necessary" for the proper organization and stimulation of efforts along these lines.[10] Accordingly, conservation campaigns were organized throughout the country, voluntary workers were enrolled, and a set of food rules were promulgated and issued,[11] all on the authority of the President alone.

Finally, in August, 1917, Congress passed the Food and Fuel Control Act,[12] vesting the President with complete control over the food and fuel resources of the nation. He was empowered, whenever he should deem it essential, to license the importation, exportation, manufacture, storage, and distribution of food, feed, fertilizer, and fuel, and to prescribe regulations governing the businesses so licensed; to fix prices of such food and fuel; to requisition such food, fuel, and other supplies, or factories or mines in which these are produced, "whenever he shall find it necessary"; to buy and sell wheat, flour, meal, beans, and potatoes, at prices to be fixed by him; to set a minimum guaranteed price for wheat (to be not less than $2 per bushel); to regulate the operations of boards of trade; to limit, regulate, or prohibit the use of foodstuffs in the production of beverages, whether alcoholic or non-alcoholic; and, finally, "to make such regulations and to issue such

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[10] Official Bulletin, June 18,1917. For statement by Mr.Hoover concerning the aims of the Food Administration,see ibid.,June 20,1917.

[11] Ibid., July 7, 1917. These were as yet, however, only for voluntary observance.

[12] Act of Aug. 10, 1917. Public No. 41, 65 Cong., in Wigmore, Source-Book of Military Law and War-Time Legislation, 504-516.

orders as are essential effectively to carry out the provisions of this Act."

Under authority of these provisions, President Wilson on August 10, 1917 (the day of the passage of the act), again formally announced the appointment of Herbert Hoover as Food Administrator[13] (although Mr. Hoover had been acting as such by executive authority since May 19), and turned over to him the immediate administration of the act. Steps were also taken at once to exercise the powers conferred by the act and to place the food resources of the country under a more thorough system of control. Through a series of proclamations, the President required licenses of practically every sort of business connected with the production and distribution of food, including elevators and mills for the storage or distribution of wheat and rye; the importation, manufacture, and refining of sugar, sirups, and molasses; the importation, manufacture, storage, and distribution of more than twenty staple foods; the dealing in bread, bakery products, and green coffee; the arsenic, ammonia, and fertilizer industries; the trading in farm equipment; stockyards and connected businesses.[14]

Besides inaugurating this system of regulation through licensing, the President empowered the Food administrator to limit profits,[15] and to requisition such foods and feeds, with their storage facilities, as he might deem necessary "for any public use connected with the common defense, other than the support of the Army or the maintenance of the Navy."[16] He guaranteed a minimum dt

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[13] Official Bulletin, Aug. 11, 1917.

[14] U.S.Stats.,65 Cong.,1 Sess.,Procs.,45,52; ibid.,2 Sess.,69, 92,98,107,131,133,158,202,222; Official Bulletin, Oct. 11, 1917, Jan. 14, May 15, 1918; N. Y. Times, Oct. 10, Nov. 13, 1917.

[15] Executive order of Nov. 23, 1917. N. Y. Times, Dec. 1,1917.

[16] Executive order of Oct. 23, 1917. Official Bulletin,Nov.1,1917.

price for the wheat crops of 1918 and 1919,[17] and ordered the organization of a Grain Corporation to purchase, store, and sell this wheat, and make the guarantee effective.[18] He limited the alcoholic content of malt and vinous liquors to 2.75 per cent, and finally brought about total prohibition by forbidding the use of any foodstuffs in the production of such malt liquors, whether alcoholic or nonalcoholic.[19]

Although most of these war-time restrictions were removed within a few months after the signing of the armistice,[20] some of them were again revived and enforced about a year after that event, when the powers of the Food Administration were transferred by executive order to the Attorney General in an attempt to avert the sugar famine and to lower the high cost of living.[21]

Similar steps to control the fuel resources of the nation were taken by the President under the provisions of the Food and Fuel Control Act. Doctor Harry A. Garfield was appointed Fuel Administrator by executive order of August 23, 1917,[22] and empowered to carry out the fuel provisions of the act. He explained the purposes of the Fuel Administration to be "to secure the largest possible production of fuel at prices just to the producer and reason-

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[17] Proclamations of Feb. 21 & Sept. 2, 1918. U. S. Stats., 65 Cong., 2 Sess., Procs., 105, 200.

[18] Executive orders of Aug. 14, 1917 & June 23, 1918. Emergency Legislation, 174-176; Official Bulletin, June 24, 1918.

[19] Proclamations of Dec. 8, 1917 & Sept. 16, 1918. U. S. Stats., 65 Cong., 2 Sess., Procs., 84, 204. These must, of course, be distinguished from the War-Time Prohibition Act, passed by Congress.

[20] Most of the licensing requirements were canceled by the proclamations of Jan. 7, Jan. 25, & Feb. 11, 1919. U. S. Stats., 65 Cong., 3 Sess., Procs., 275, 285, 287. The prohibition regulations were modified so as to permit the manufacture of near-beer and other non-intoxicating beverages, by the proclamations of Jan. 30 & Mar. 4, 1919. Ibid., 286, 293.

[21] N. Y. Times, Nov. 22, 1919.

[22] Official Bulletin, Aug. 24, 1917.

able to the consumer."[23]

As with regard to the food resources, so the President likewise inaugurated a system of licenses for controlling the distribution of coal and coke and the various other fuel products, such as fuel oil and natural gas;[24] and fixed the prices to be charged.[25] The Fuel Administrator, with the approval of the President, issued several very drastic orders for the purpose of conserving fuel, such as those for the elimination of electric advertising signs and for certain "lightless nights";[26] and the sensational order of January 17, 1918, suspending the operation of practically all industry east of the Mississippi River for a period of five days beginning January 18, and making the following nine Mondays "heatless days". This order was promulgated in spite of protests from every part of the country, opinions that the order exceeded the authority of the Executive, and an official resolution of the Senate asking for delay and an explanation,[27] -- all of which illustrates clearly the vast war-time power of the President.

As with regard to the powers of the Food Administration, so those of the Fuel Administration were revived by the President after the signing of the armistice and the virtual ending of the war, in order to meet a particular situation. After having pronounced the coal strike called for November 1, 1919, unjustifiable and unlawful, and having requested, without success, that the strike be called off,[28] President Wilson, by executive order of October 30, restored the war-

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[23] Official Bulletin, Aug. 24, 1917.

[24] Proclamations of Jan. 31, Mar. 15, & Sept. 16, 1918. U. S. Stats., 65 Cong., 2 Sess., Procs., 99, 113, 205.

[25] Official Bulletin, Aug. 24, Sept. 6, Oct. 29, 1917.

[26] Ibid., Nov. 14, Dec. 15, 1917.

[27] See N. Y. Times, Jan. 17, Jan. 18, 1918.

[28] See President Wilson's statement concerning the strike. Ibid., Oct. 26, 1919.

time powers of Fuel Administrator Garfield and gave him full authority to use these powers in applying such regulations as he should deem necessary to avert a coal famine. Accordingly, the priority list of May 25, 1918, was restored, the Railroad Administration was vested with power to divert coal shipments, the Department of Justice was charged with the enforcement of the maximum price list, drastic restrictions on the use of coal by "nonessential" industries were put into effect, railroad service was curtailed, and rigid regulations were applied concerning the distribution of coal to consumers, until the strike was called off December 10.[29]

It should be noted that all these restrictions and regulations concerning both the food and fuel resources, were established by order of the President, even after the signing of the armistice, by virtue of the "war powers" conferred upon him by the Food and Fuel Control Act, a war measure which had not yet expired.

Control of Trade and Industry. Congress, by virtue of its power over interstate and foreign commerce,[30] may make such regulations with regard to both foreign and domestic commerce as it may deem necessary or helpful towards the crippling of an enemy and the success of a war. It chose to exercise this power during the events leading up to the War of 1812 and during the war itself by passing several embargo and non-intercourse acts.[31] During the Civil War, Congress exercised the same power by forbidding all in-

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[29] N. Y. Times, Nov. 1, Dec. 2, Dec. 9, Dec. 11, 1919. The restrictions were only gradually lifted after the calling off of the strike.

[30] Constitution, Art. I, Sec. 8, Cl. 3.

[31] Acts of Mar. 1 & June 28, 1809; Apr. 4, Apr. 14, & July 6, 1812; Dec. 17, 1813; Feb. 4, 1815. Annals of Cong., 10 Cong., 2 Sess., App., 1824; 11 Cong., II, App., 2508; 12 Cong., II, App., 2262, 2269, 2354; 13 Cong., II, App., 2781; 13 Cong., 3 Sess., App., 1899. Regarding the purpose of these as war measures, see Writings of James Madison, VIII, 185-186, n., 188.

tercourse between citizens of the loyal states and of those in rebellion, except by license from the President.[32]

Even without authority from Congress, however, the President is also vested with considerable power in regard to the control of trade in time of war. By virtue of his position as Commander-in-Chief, he may declare a blockade of the enemy's ports,[33] and thus cut off completely both the import and export trade with the enemy nation. President Polk exercised this power by ordering a blockade of the Mexican ports in 1846,[34] President Lincoln of the Southern ports in 1861,[35] and President McKinley of certain Cuban ports in 1898.[36] It has also been held that the President may, at least in the absence of Congressional action to the contrary, permit a limited commercial intercourse with the enemy in time of war, and impose such conditions as he sees fit.[37]

During the recent war with Germany and Austria-Hungary, President Wilson never declared a blockade of those countries, as he might have done, for the reason that such action would not have cut off the supplies slipping through neutral countries. Since the United States was practically the only source of supply for these neutral countries, the problem was more effectively solved by giving the President blanket authority to regulate the foreign trade of

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[32] Act of July 13, 1861. 12 Stat. at L., 255, 257 (Sec. 5). President Lincoln, by order of Feb. 28, 1862, permitted such intercourse under rules and regulations prescribed by the Secretary of the Treasury. Works of Abraham Lincoln (Federal ed.), V, 438. The removal of the restrictions so placed was begun immediately after the cessation of hostilities (Apr. 29, 1865), and completed by June 24, 1865. Dunning, Reconstruction: Political and Economic, 27.

[33] Prize Cases, 2 Black, 635 (1862).

[34] Richardson, Messages and Papers of the Presidents, IV, 492, 493.

[35] Proclamations of Apr. 19 & 27, 1861. Ibid., VI, 14, 15.

[36] Proclamations of Apr. 22 & June 27, 1898. Ibid., X, 202, 206.

[37] Hamilton v. Dillin, 21 Wall., 73, 87 (1874); cf. Glenn, The Army and the Law, 69-70.

the United States. Under the provisions of the Espionage Act, the President was empowered, whenever in his opinion the public safety should require, to forbid the exportation of any articles to any country except under such regulations as he might choose to make.[38] Under the Trading with the Enemy Act, he was given similar power with respect to imports.[39]

By virtue of this authority, President Wilson at various times during the war proclaimed an embargo on long lists of articles,[40] and prohibited the importation of other articles,[41] except under a system of licenses which he placed under the supervision of the War Trade Board.[42] In this way he was able to exercise complete control over the foreign trade of the United States during the period of the war, and thus to prevent supplies from reaching the enemy, either directly or through neutral channels.

In time of war the President also exercises a large measure of control over business within the United States, his power in that regard being apparently based largely on statutory provisions, but also being exercised in some instances by virtue of no specific authority. For example, President Wilson, immediately upon the declaration of a state of war with Germany and on later occasions

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[38] Act of June 15, 1917. Public No. 24, 65 Cong. (Title VII), in Wigmore, op. cit., 493.

[39] Act of Oct. 6, 1917. Public No. 91, 65 Cong. (Sec. 11), in Wigmore, op. cit., 557.

[40] Proclamations of July 9, Aug. 27, Sept. 7, Nov. 28, 1917; Feb. 14, 1918. U. S. Stats., 65 Cong., 1 Sess., Procs., 39, 47, 50; ibid., 2 Sess., 76, 102.

[41] Proclamations of Nov. 28, 1917; Feb. 14, 1918. Ibid., 2 Sess., 77, 103.

[42] Created under authority of the Trading with the Enemy Act, and composed of representatives of the Secretaries of State, Treasury, Agriculture, and Commerce, and of the Food Administrator, the Shipping Board, and the War Industries Board. See executive orders of Oct. 12, 1917 & Aug. 20, 1918. Official Bulletin, Oct. 15, 1917, Sept. 3, 1918.

placed restrictions upon the German insurance companies doing business in the United States and made regulations with regard to German letters patent, his action in each case being based, not on statute, but solely on "the authority vested in me as such".[43]

Considerable power was vested in the President by the National Defense Act of 1916, which authorized him in time of war or when war is imminent, to order any individual or firm having the facilities to comply, to furnish supplies or equipment for the Army in preference to any other commitments, at prices named by him; and in case of default, to seize and operate the plant.[44] Similar power to requisition shipyards and factories for the manufacture of supplies needed for the Navy was vested in the President by the Naval Emergency Fund Act of 1917.[45]

On July 28, 1917, the War Industries Board was created by the Council of National Defense, with the approval of the President, to serve as "a clearing house for the war industry needs of the Government";[46] and in March, 1918, its functions were by a mere letter of the President continued, expanded, and vested almost exclusively in the chairman, Bernard M. Baruch.[47] Finally, by executive order of May 28, 1918, the President formally made the War Industries Board an independent administrative agency acting directly under his authority, and thereby created what one writer says was "in effect an Industries Administration analogous in all essenini

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[43] Proclamations of Apr. 6, May 24, & July 13, 1917. U.S. Stats., 65 Cong., 1 Sess., Procs., 10, 25, 40.

[44] Act of June 3, 1916. Public No. 85, 64 Cong. (Sec. 120), in Wigmore, op. cit., 439-440.

[45] Act of Ma . 4, 1917. Public No. 391, 64 Cong. Ibid., 458.

[46] War Cyclopedia (1st ed.), 293.

[47] See President Wilson's letter of Mar. 4, 1918, to Mr. Baruch, outlining the functions of the board and the duty of the chairman. Official Bulletin, Mar. 31, 1918.

tial respects to the Food and Fuel Administrations previously created. . . The Board derived its legal powers directly from the President. It therefore had the power to exercise, within its field, all the powers of the President over industry entrusted to him by statute or possessed by him in virtue of his position of head of the armed forces of the Nation."[48]

Under the direction of its chairman and upon the sole authority of the President, the board assumed a very large control of the industrial resources of the nation. It acted as an agency for centralizing the war demands of the several government services; purchased supplies for the Allies; created new facilities and new sources of supply; determined priorities of production and delivery; fixed prices; and sought to secure the elimination of waste and unnecessary effort, and the securing of economy of time and materials. The chairman was in general required to act as the "general eye of all supply departments in the field of industry", to be a sort of "industrial chief of staff."

While the various orders and decisions of the board were legally only "requests", they were backed by the President's powers to requisition factories, to withhold fuel and transportation facilities, and in other ways to compel compliance; so that the War Industries Board was well described as being able to "mold the country's industrial system almost as it will", and as "a notable demonstration of the power of war to force concert of effort and collective planning with centralized responsibility."[49] Through these

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[48] Willoughby, Government Organization in War Time and After, 76-77; see also C. N. Hitchcock, "The War Industries Board; Its Development, Organization and Functions", in Jour. Pol. Econ., XXVI, 545-565 (June, 1918), esp. 547, 563.

[49] C. N. Hitchcock, op. cit., 565, 566.

various means, the President was enabled to exercise a complete control over all businesses having any relation to war needs, which in modern times includes practically the entire business life of the nation.

Control of Property. The President likewise has considerable power in time of war with regard to private property. In the United States it has been held that a state of war justifies the seizure and confiscation of enemy property found within the borders of the country,[50] in accordance with which theory the Confiscation Acts of the Civil War[51] were passed, providing for the seizure of rebel property under certain conditions. The general practice of nations has, however, brought about the modern rule of international law that such enemy property is no longer subject to confiscation, but only to sequestration for the period of the war.[52]

The power of such sequestration might be presumed to rest with the President by virtue of his executive authority, without any further statutory authorization. All doubt was removed, however, during the recent war, by inserting in the Trading with the Enemy Act provisions which empowered the President, through the Alien Property Custodian created by that act, to take over and administer for the period of the war such enemy property as he might require.[53] President Wilson carried out these powers through various executive

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[50] Brown v. U. S., 8 Cr., 110, 122, (1814); Miller v. U. S., 11 Wall., 268, 305, (1870); cf. Glenn, The Army and the Law, 112, 115.

[51] Acts of Aug. 6, 1861, July 17, 1862, & Mar. 3, 1863. 12 Stat. at L., 319, 589, 820.

[52] Lawrence, Principles of International Law, 424-429.

[53] See esp. Secs. 6, 7. Wigmore, op. cit., 548-552. The seizure of property by the Alien Property Custodian could not be enjoined by the courts, his decisions as to what constituted enemy character being held to be unreviewable preceding the transfer of the property. Salamandra Ins. Co. v. New York Life Ins. Co., U. S. D. C., S. D. N. Y. (1918), cited in Yale Law Jour. XXVIII, 499 (Mar., 1919).

orders, which fixed the salary of the Alien Property Custodian and defined his powers and duties, and which entrusted him with the management, administration, and disposition of enemy property of all kinds, including such things as real estate, personal property, seats on stock exchanges, and businesses of all descriptions.[54] In short, the Alien Property Custodian was authorized "to step into the shoes of the enemy and exercise all the rights and powers with respect thereto which the enemy could exercise if no state of war existed."[55]

Other powers with regard to the control of property were also vested in the President. Several acts of Congress authorized the taking of land for military or naval purposes,[56] under which President Wilson seized such property as the Jamestown Exposition site and large tracts of land in Maryland, and ordered the residents to vacate immediately, the compensation to be determined later.[57] Finally, by the Act of May 16, 1918,[58] the President was empowered during the war to seize private property of any kind, whether real estate, buildings, furnishings, or improvements, "as he may determine to be necessary for the proper conduct of the existing war", with compensation to be fixed later. Although under this act nothing was exempt from being commandeered, its chief purpose was to facilitate the seizure of housing for war workers and government offices,[59]

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[54] Executive orders of Oct.29,1917; Feb.26,Apr.2,July 15, July 16, Aug.29,Sept.12,Sept.13,Nov.12,1918. Official Bulletin,Oct. 31,1917; Mar.2,July 18,July 23,Aug.31,Sept.17,Sept.20,1918;Jan.3,1919.

[55] Statement of the Alien Property Custodian (A. Mitchell Palmer), in Official Bulletin, Mar. 2, 1918.

[56] Acts of June 15, & Oct. 6, 1917; Apr. 26, 1918. Public Nos. 23, 64, 140, 65 Cong.

[57] Proclamations of June 28, Oct.16,Dec.14,1917; June 10,1918. U.S.Stats.,65 Cong.,1 Sess.,Procs.,30; ibid.,2 Sess.,63,87,146.

[58] Public No. 149, 65 Cong.

[59] See statements of Assistant Secretary of War Crowell, in N. Y. Times, Mar. 21, Mar. 22, 1918.

in accordance with which the President created a Housing Corporation as an agency through which the Secretary of Labor might carry out the provisions of the act.[60]

By these means the President was enabled to exercise a complete control of all private property within the United States, whose use might in his opinion benefit the enemy or which he might consider essential to the war needs of the country.

Control of Transportation and Communication. The importance of the transportation and communication services in the successful prosecution of war is perhaps second only to that of the actual fighting service. The close relation between the operation of these lines of communication and the military operations, and the necessity of securing their absolute control by the military authorities, in order to insure the regular and systematic transportation of troops and supplies, were recognized quite early during the Civil War. Congress, by Act of January 31, 1862,[61] authorized the President, when in his judgment the public safety should require it, to take possession of any or all telegraph and railroad lines within the United States, together with all their equipment and personnel; to prescribe rules and regulations for the use of these lines; and to place them under military control.

Accordingly, President Lincoln, by order of February 11, 1862, appointed D. C. McCallum as Military Director and Superintendent of Railroads, giving him full authority to take possession of the railroads and to do "all things that may be necessary and pro-

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[60] Executive order of Oct. 29, 1918. Official U. S. Bulletin, Jan. 21, 1919.

[61] 12 Stat. at L., 334. By joint resolution of July 14, 1862, this act was declared not to authorize the President to engage in any work of railroad construction. Ibid., 625.

per" for the transportation of troops and supplies;[62] and on May 25, 1862, the President took formal military possession of all the railroads in the United States.[63] More than 2,000 miles of railroad were operated, mostly in Southern or border states,[64] which were turned back to their owners under certain regulations on August 8, 1865.[65]

During the first months of the recent war, an attempt was made to meet the transportation needs of the nation by leaving the operation of the railroads under private control, but as one system under the direction of the Railroads War Board, a special committee of the American Railway Association, cooperating with Mr. Daniel Willard, chairman of the Transportation and Communication committee of the Council of National Defense.[66] This did not prove satisfactory, however, and before the end of 1917, suggestions were made from authoritative sources that the President should take control of the railroads and operate them for the period of the war,[67] authority for which he already possessed by virtue of the Army Appropriations Act of 1916.[68]

Acting under this authority, President Wilson, by proclamation of December 26, 1917,[69] took possession of all the rail and water transportation systems in the United States (excepting street-car and interurban lines[70]), and vested their administration

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[62] Richardson, Messages and Papers of the Presidents, VI, 101.

[63] Ibid., 113. See also orders of May 28 & July 11, 1862. Ibid., 113, 116.

[64] Cong. Record, 65 Cong., 2 Sess., 2556, 6923 (Feb. 19, May 13, 1918).

[65] Ibid., 2556; Fleming, Documentary History of Reconstruction, I, 205-206.

[66] War Cyclopedia (1st ed.), 229, 273.

[67] See report of Interstate Commerce Commission, in N.Y. Times, Dec. 6, 1917.

[68] Act of Aug. 29, 1916. U.S. Stats., 64 Cong., 1 Sess., 619, 645.

[69] U. S. Stats., 65 Cong., 2 Sess., Procs., 89.

[70] By act of Apr. 22, 1918, the President was also authorized to take over and operate such of these as might be necessary for the

in Secretary of the Treasury McAdoo, who was designated Director General of Railroads. Later the President confirmed and continued the authority of Mr. McAdoo as Director General,[71] under the provisions of the Railway Control Act,[72] passed by Congress in order that the President's authority might be complete and undoubted.[73] This act confirmed the President's power to take over, control, and operate the railroads under the act of 1916, authorized him to compensate the owners and initiate rates, and provided that he might relinquish such control at his discretion, but that he might in no case exercise it longer than one year and nine months after the declaration of peace.

Acting under the authority so conferred upon him by the President, Director General McAdoo immediately assumed active charge, unified the railroads of the country into one system, made regulations concerning their operation, named his subordinate officers, fixed both interstate and intrastate rates,[74] increased the wages of employees provided for the adjustment of labor disputes, and in general exercised complete control,[75] not only of the railroads, but also of the coastwise steamship lines, ship canals, and express companies, control of which had later been taken over by the Presi-

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transportation of the employees at the shipyards and plants. Official Bulletin, May 7, 1918.

[71] Proclamation of Mar.29,1918. U.S.Stats.,65 Cong.,2 Sess., Procs., 119.

[72] Act of Mar.21,1918. Public No.107,65 Cong.,in Wigmore, op. cit., 575-583.

[73] Senator Cummins and others held, for example, that the President's scheme of compensation to the owners required additional legislation, and it was doubted by many whether he had the power to fix rates under the act of 1916. That the President doubted his own authority on some of these points is indicated by his statement that he intended to recommend additional legislation. See N.Y.Times,Dec.27, 1917.

[74] The right to fix intrastate as well as interstate rates was upheld in Northern Pacific Ry. Co. v. North Dakota, 250 U. S., 135, cited in Am. Pol. Sci. Rev., XIII, 619 (Nov., 1919).

[75] A considerable number of the orders issued by the Director General are listed in Emery & Williams, Governmental War Agencies Affecting Business, 44-49.

dent.[76]

Upon the resignation of Mr. McAdoo a short time after the armistice, the President appointed Walker D. Hines to succeed him as Director General,[77] and continued through him to exercise control of the transportation systems of the United States with the view of rendering adequate service at a reasonable cost.[78] In his message to Congress, May 20, 1919, President Wilson announced his intention to return the railroads to their owners at the end of the year,[79] but no legislation on the subject of future railroad control having by that time been enacted by Congress, he postponed the date of return, setting it by formal proclamation at March 1, 1920.[80] Congress having finally enacted railroad legislation by that date,[81] the railroads were then returned as promised. Thus, for more than two years, more than half of that time after the virtual end of the war, the President exercised complete control of the transportation systems of the country, a control which he might have extended considerably longer, on account of the delay in the ratification of the peace treaty and the formal declaration of peace.

With regard to shipping, a large measure of control was exercised by the President during the recent war through the Shipping Board and the Emergency Fleet Corporation, created by the Act of

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[76] Proclamations of Apr. 11, July 22, Nov. 16, 1918. U. S. Stats., 65 Cong., 2 Sess., Procs., 125, 164, 245.

[77] Proclamation of Jan. 10, 1919. Ibid., 3 Sess., 278.

[78] "Until the signing of the armistice the Government's first railroad duty was to run the railroads to win the war, but now that the war is won, the Government's railroad job is to render an adequate and convenient transportation service at reasonable cost." Statement of Mr. Hines on assuming office, Jan. 11, 1919, Official U. S. Bulletin, Jan. 13, 1919.

[79] See his message in United States Bulletin, May 26, 1919.

[80] Proclamation of Dec. 24, 1919. N. Y. Times, Dec. 25, 1919.

[81] The Esch-Cummins Railroad bill was signed by the President Feb. 28, 1920. Ibid., Feb. 29, Mar. 1, 1920.

September 7, 1916.[82] Acting under the direction of the President, this board and this corporation had as their war-time task the providing of an adequate merchant marine to meet the extraordinary transportation demands of the war and the losses from submarine attacks. The Shipping Board controlled directly the operation of all American ocean vessels; and by means of authority delegated to it by executive order, requisitioned all American ships completed or building during the war; fixed freight rates, and determined terminal charges.[83] The Emergency Fleet Corporation, acting as the construction agency of the Shipping Board (and, through it, of the President), added a vast amount of tonnage to the shipping in use during the war.[84]

Additional shipping was secured through the seizure of enemy and neutral vessels lying within United States ports at the outbreak of the war. International law and practice allow a belligerent to requisition and utilize such vessels, if needed for war purposes,[85] and the presumed authority of the President to act under this rule was further strengthened by the Joint Resolution of May 12, 1917,[86] expressly authorizing him to take over *enemy* vessels for use and operation during the war, and by a provision in the Emergency Shipping Fund Act of June 15, 1917,[87] empowering him similarly to requisition *any* vessel within the jurisdiction of the

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[82] Public No. 260, 64 Cong., in Wigmore, *op. cit.*, 447-454; amended by Act of July 15, 1918, Public No. 198, 65 Cong., *ibid.*, 455-457.

[83] See, for example, its announcement requisitioning on Oct. 15, 1917, all American vessels of not less than 2500 tons capacity. *Official Bulletin*, Oct. 13, 1917. See also executive orders of June 18 & Dec. 3, 1918. *Ibid.*, June 20, Dec. 16, 1918.

[84] Figures for the early months of the war may be found in *War Cyclopedia* (1st ed.), 253.

[85] Lawrence, *Principles of International Law*, 456, 626-628.

[86] Public Res. No. 2, 65 Cong., in *Emergency Legislation*, 18.

[87] Public No. 23, 65 Cong., in Wigmore, *op. cit.*, 482-484.

United States. Acting therefore under authority both of international law and of statute, President Wilson seized the German and Austrian vessels interned in the ports of the United States,[88] and likewise requisitioned the Dutch ships lying idle within its jurisdiction.[89] The docks and terminal equipment of the German steamship companies were also taken over,[90] under express statutory authority,[91] the compensation therefore being determined by the President after the signing of the armistice.[92]

It has already been noted that the Act of Congress authorizing military control of the railroads during the Civil War, also authorized the President to assume such control of the telegraph lines.[93] Acting under this authority, the President, on February 26, 1862, took military possession of all the telegraph lines in the United States, and appointed Anson Stager Military Superintendent of these lines, exercising military control during the remainder of the war. It was expressly ordered, however, that such control was "not intended to interfere in any respect with the ordinary affairs of the companies or with private business."[94]

During the recent war, a much more comprehensive control was established over all the means of communication. As early as 1912, Congress had authorized the President, "in time of war or public peril or disaster", to close, control, or take over and use

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[88] Executive orders of May 14, May 16, May 22, June 12, June 30, July 3, Sept. 27, Nov. 2, 1917. Emergency Legislation, 169-170, 171-173, 179, 189; N. Y. Times Current Hist. Mag., VI, 237.

[89] Proclamation of Mar. 20, 1918. U. S. Stats., 65 Cong., 2 Sess., Procs., 117. The 87 Dutch vessels thus seized were returned in the early part of 1919. Official U. S. Bulletin, Feb. 3, 1919.

[90] Proclamation of June 28, 1918. U. S. Stats., 65 Cong., 2 Sess., Procs., 160.

[91] Urgent Deficiency Act of Mar. 28,1918. Public No.109,65 Cong.

[92] Proclamation of Dec.3,1918. U.S.Stats.,65 Cong.,3 Sess., Procs., 270.

[93] Supra,244.

[94] ~~See~~ order of Feb.25,1862. Richardson,op.cit.,VI, 108-109.

all the radio stations within the jurisdiction of the United States;[95] and by joint resolution of July 16, 1918, he was further empowered to take possession of and to operate, in time of war, any telegraph, telephone, marine cable, or radio system, such control not to extend beyond the date of the declaration of peace.[96]

Acting therefore under express statutory authority, President Wilson, immediately upon the entry of the United States into the world war, directed the Secretary of the Navy to assume control of all the means of radio communication within the jurisdiction of the United States.[97] On July 22, 1918, he took over the telegraph and telephone systems, vesting their administration in the Postmaster General;[98] and shortly before the armistice was signed, he likewise assumed control of the marine cables.[99]

The war-time control thus assumed of the wire services differed from that assumed in the Civil War in that it was not strictly for military purposes, but to overcome the difficulties of a competitive system arising out of the war, and "to broaden the use of the service at the least cost to the people."[100] The seizure of the cables, though vigorously assailed as an undue exercise of executive power,[101] was explained by the President to have been necessary in order "to keep an open wire constantly available between Paris and the Department of State, and another between France

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[95] Act of Aug. 13, 1912. 37 Stat. at L., 302 (Sec. 2).

[96] Public Res. No. 38, 65 Cong., U. S. Stats., 65 Cong., 2 Sess., 904.

[97] Executive order of Apr. 6, 1917. Willoughby, Government Organization in War Time and After, 40.

[98] Proclamation of July 22, 1918. U. S. Stats., 65 Cong., 2 Sess., Procs., 163.

[99] Proclamation of Nov. 2, 1918. Ibid., 228.

[100] Statement of Postmaster General Burleson on assuming control. Official Bulletin, July 24, 1918.

[101] See argument of ex-Justice Hughes. N. Y. Times, Dec. 28, 1918.

and the Department of War,"[102] and was upheld by the courts as a legitimate exercise of his war power.[103]

Complete control over these various systems of communication was exercised by the Postmaster General, acting under the direction and authority of the President, extending to the unification of the various competing companies, the ousting of the old officers in many cases, and the fixing of rates, both interstate and intrastate,[104] until the systems were returned to private control.[105]

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[102] Address to Congress, Dec. 2, 1918. N. Y. Times, Dec. 3, 1918.

[103] Commercial Cable Co. v. Burleson, U. S. D. C., S. D. N. Y. (1919), cited in Yale Law Jour., XXVIII, 513 (Mar., 1919).

[104] The President's right to fix both interstate and intrastate rates for the wire services was upheld in Dakota Central Telephone Co., v. South Dakota, 250 U. S., 163 (1919), cited in Am. Pol. Sci. Rev., XIII, 619 (Nov., 1919).

[105] The cables were, by order of Apr. 29, 1919, returned to their owners on May 2, 1919; the telegraph and telephone systems on August 1, 1919. United States Bulletin, May 1, 1919; Pol. Sci. Quar., XXXIV, Supp., 25 (Sept., 1919).

IV. POWERS RELATING TO THE TERMINATION OF WAR.

Chapter XIII.

Power of Terminating War in the United States.

There are generally said to be three different ways in which a way may be terminated: (1) there may be a simple cessation of hostilities on the part of the belligerents; (2) there may be a complete subjugation of one of the belligerents by the other, involving the conquest and annexation of its territory and the extermination of its government; and (3) there may be a formal reestablishment of peaceful relations between the belligerents through an agreement embodied in a special treaty.[1]

Instances of the first method are rare, and have never occurred in the case of wars to which the United States has been a party. The second method is more common in the history of nations,[2] but would seem to be precluded as a possibility on the part of the United States, because of the doctrine laid down by the Supreme Court that wars of conquest and aggrandizement by the United States are unconstitutional.[3] A treaty of peace is therefore not

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[1] Oppenheim, International Law, II, 275; Lawrence, Principles of International Law, 568.

[2] For examples of each of these methods, see Oppenheim, op. cit., II, 275-276, 279.

[3] "The genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purpose of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens. A war, therefore, declared by Congress can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. . . He may invade the hostile country, and subject it to the sovereignty and authority of the United State. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power." Fleming v. Page, 9 How., 603, 614-615 (1849). Cf. also S.E.Baldwin, in Am.Jour.Int.Law, XII, 14 (Jan., 1918); Memoirs of John Quincy Adams, XII, 144 (Jan. 10, 1845).

only "the normal method of terminating war",[4] and the only method heretofore employed in the case of wars in which the United States has been a belligerent (excepting, of course, the Civil War), but has also apparently been considered throughout our entire history as the only possible method under the Constitution.

Recently, however, strong opinions have been expressed that wars may be terminated by the United States in other ways than by a formal treaty of peace. Thus, in an address before the Washington Commercial Club, March 18, 1919, Senator Lenroot (Wisconsin), speaking against the proposed constitution for the League of Nations and protesting particularly against the incorporation of that constitution into the peace treaty, made this statement: "We have accomplished the purpose we had when we declared war and, while it would be desirable to have a formal treaty of peace with Germany, it is not necessary. We can declare the war ended and go about our business, and I confidently predict that this is what will be done if the treaty is not ratified by the Senate."[5] A statement by Senator Poindexter (Washington), issued on the same day, was to the same effect but even more explicit: "If the American delegation refuses to make peace with Germany, let the Entente make peace with Germany, and let Congress assemble and declare peace and pass a law to bring the American army home. Congress has the same power to declare peace that it has to declare war, and has full control over all movements of the army and navy, including the Commander-in-Chief."[6] A leading journal likewise expressed the opinion that "Congress could at any time by simple resolution declare the state

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[4] Oppenheim, *op. cit.*, II, 280.
[5] *N. Y. Times*, Mar. 19, 1919.
[6] *Ibid.*, Mar. 18, 1919.

of war at an end"[7], and at least one distinguished jurist has concurred in these views, saying that "peace could, no doubt, also be restored by an Act of Congress".[8]

Moreover, serious attempts have recently been made in Congress to assert the power of that body to declare peace independently of a formal treaty. Thus, Senator Knox, on June 10, 1919, declared that any attempt on the part of the Peace Conference to so intertwine the peace treaty and the covenant of the League of Nations as to prevent their separation by the Senate, would be met with a resolution in Congress declaring the war formally at an end.[9] On June 23, Senator Fall (New Mexico) and Senator Edge (New Jersey) each offered joint resolutions in the Senate declaring the state of war between Germany and the United States terminated; and on September 15, Representative Mason (Illinois) submitted a concurrent resolution in the House declaring peace "with all the world."[10]

These resolutions were all allowed to die in committee, but immediately after the first rejection of the treaty on November 19, Senator Lodge, Republican floor leader and chairman of the Senate Committee on Foreign Relations, offered a concurrent resolution "that the said state of war between Germany and the United States is hereby declared to be at an end", while Senator Knox, on December 13, offered a joint resolution declaring simply, "That peace exists between the United States and Germany." These two resolutions were taken under serious consideration by the Senate Committee

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[7] The Nation, May 31, 1919.

[8] S. E. Baldwin, in Am. Jour. Int. Law, XII, 13-14 (Jan.,1918).

[9] Press report in Chicago Tribune, June 11, 1919.

[10] S. J. Res. 60, Mr. Fall; S. J. Res. 61, Mr. Edge; H. Con. Res. 32, Mr. Mason. Cong. Record, 66 Cong., 1 Sess., 1629, 5808.

on Foreign Relations, and on December 20, Senator Knox reported from that committee a substitute joint resolution, repealing the joint resolution of April 6, 1917, which declared a state of war with Germany, and providing that such repeal should be effective, with certain stated conditions upon Germany, "upon the ratification of a treaty of peace between Germany and three of the principal allied and associated powers."[11]

The expressions of opinion noted, the presentation and serious consideration of these resolutions by the responsible leaders of the majority party in Congress, and the later unprecedented action in actually pressing a similar resolution to a vote,[12] would seem to make pertinent a brief examination into the subject of the power, in the United States, to terminate war and declare peace.

Passing over the obviously unsound inference of Senator Poindexter that Congress might assemble in special session on its own motion, without a call from the President,[13] it might seem evi-

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[11] S.Con.Res.17, Mr.Lodge; S.J.Res.136, Mr. Knox; S.J.Res.139, Mr. Knox. Cong.Record, 66 Cong., 1 Sess., 9321; ibid., 2Sess., 540, 981.

[12] Immediately after the second rejection of the peace treaty by the Senate on Mar. 19, 1920, Senator Knox moved consideration of his resolution repealing the declaration of war, and several proposals were again made in the House for terminating the state of war and declaring peace by action of Congress. Apparently the Republicans reached an agreement to drop the Knox resolution, and instead to press the Porter resolution (prepared by the House Committee on Foreign Affairs), which declared that "Whereas, the President of the United States in the performance of his constitutional duty to give to Congress information of the state of the Union, has advised Congress that the war with the Imperial German Government has ended, . . the state of war declared to exist between the Imperial German Government and the people of the United States. . .is hereby declared at an end." This resolution also provided for the repeal of all the war emergency legislation, and gave Germany 45 days in which to declare a like termination of the war under the conditions imposed, with a penalty of an economic boycott in case of refusal. In this form the Porter resolution was introduced into the House Mar.31, and passed by that body on April 9, by a vote of 242-150, and at this writing (Apr., 1920) seems likely to pass the Senate also. This action does not affect the argument of this chapter that such a method of terminating war is unconstitutional and of no effect in the United States. See text of Porter resolution in N.Y.Times, Apr. 1, 1920.

[13] Supra, 254.

dent that since Congress has the power to bring about a state of war by means of a declaration, which has in every case taken the form of an act of Congress or of a joint resolution,[14] it could also, by a mere repeal of such declaration, terminate the state of war and bring about a state of peace.[15] It should be pointed out in the first place, however, that Congress does not have an absolute power of repeal; that is, it cannot repeal each and every legislative enactment and thereby restore the status quo ante. For example, states are admitted to the Union by means of an enabling act passed through the ordinary legislative channels; but no state can be deprived of its place in the Union by a subsequent repeal or nullification of that earlier legislative act of admission.[16] Hence, it does not necessarily follow that Congress can, by an act of repeal, terminate a state of war and declare a state of peace, merely because it can, by a legislative declaration, bring about such a state of war.

In the second place, it should be noted that such an act of repeal, if it be considered proper at all, would be subject to the approval or veto of the President, just as the original declaration, and hence its enactment would not be so simple a matter as these Senators seem to conclude. If such an act were passed over the President's veto, the President could still prevent the complete restoration of a normal state of peace by declining to resume diplomatic relations with the former enemy or to perform other acts that

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[14] The declarations in the cases of the war of 1812, the war with Mexico, and the war with Spain were in the form of acts of Congress; those in the recent wars with Germany and Austria-Hungary in the form of joint resolutions.

[15] This is the particular point emphasized by Judge Baldwin, op. cit., note 8.

[16] See Willoughby, On the Constitution, I, 426.

are strictly within his jurisdiction but which presuppose a state of peace. A declaration of peace by Congress through a concurrent resolution, such as that proposed by Senator Lodge, would clearly be unconstitutional, since it would deprive the President of his constitutional right to approve or disapprove every act of legislative effect.[17] At the most, such a resolution would amount to nothing more than an expression of opinion, and could be entirely disregarded by the President.[18] Apparently Senator Lodge and the Foreign Relations Committee of the Senate recognized the impossibility of any attempt by Congress to declare peace without the cooperation of the President, when the Lodge concurrent resolution was dropped and a substitute joint resolution was proposed.[19]

Finally, while the Constitution specifically gives Congress the power to declare war, it does not anywhere expressly confer the power of declaring or making peace. Hence it is by no means certain that Congress has any power, either by a repeal of its original declaration, or by an independent act, resolution, or declaration, to terminate a state of war and bring about a state of peace. A study of the debates in the Convention of 1787 will throw some light on the intention of the makers of the Constitution in that regard.

When the power of declaring war was under consideration on August 17, Mr. Pinkney opposed vesting the power in the Legislature but favored the Senate as the best depository, saying that "it would be singular for one authority to make war, and another peace". Mr. Ellsworth, on the other hand, thought there was a material difference between the cases of making war and declaring peace, adding

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[17] *Constitution*, Art. I, Sec. 7, Cl. 3.

[18] Cf. Quincy Wright, in *Columbia Law Rev.*, XX, 128-129, 131 (Feb. 1920).

[19] *Supra*, 256 ~~and~~ note 12, 256.

that "war also is a simple and overt declaration, peace attended with intricate and secret negotiations." After the power of declaring war had been definitely voted to Congress, Mr. Butler, evidently agreeing with Pinkney that the power of making war and peace should be in the same hands, moved to add the words "and peace" after the word "war", thus giving to the Legislature the power over both. Gerry seconded the motion, remarking that the "Senate are more liable to be corrupted than the whole Legislature". However, the motion was lost by unanimous vote of the States, the Convention thus taking a definite stand against giving Congress the power to make peace.[20]

The intention of the Convention as to the proper location of the power to make peace is further shown in the debates and in the actions taken concerning the treaty-making power. The clause regarding treaties as reported to the Convention read as follows: "The President by and with the advice and consent of the Senate shall have power to make Treaties, but no treaty shall be made without the consent of two thirds of the members present". When this came up for consideration on September 7, Mr. Wilson attempted to have the concurrence of the House of Representatives added to that of the Senate, but his motion was lost, receiving only two affirmative votes.[21] Madison's motion to except treaties of peace from the two-thirds provision, "allowing them to be made with less difficulty than other treaties", was adopted unanimously, whereupon he moved to authorize two-thirds of the Senate to make treaties of peace without the concurrence of the President. "The President", he said, "would necessarily derive so much power and importance from

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[20] Madison's Journal (Hunt ed.), II, 188-189.
[21] Ibid., 327-328.

a state of war that he might be tempted, if authorized, to impede a treaty of peace." Mr. Butler seconded this motion and argued strenuously for it "as a necessary security against ambitious and corrupt Presidents". Mr. Gorham and Gouverneur Morris opposed the motion, the latter holding "that no peace ought to be made without the concurrence of the President, who was the general Guardian of the National interests."[22] Madison's motion failed,[23] but the next day the whole clause was reconsidered, and another distinct effort was made, under the leadership of Mr. Sherman, to require the sanction of the Legislature to "rights established by a treaty of peace." Though seconded by Mr. Morris, Sherman's motion does not appear even to have been acted upon, the final action of the Convention being to adopt the clause as originally reported, the exception of treaties of peace from the two-thirds provision being stricken out.[24]

The discussion throughout shows very clearly that an overwhelming majority in the Convention thought as did Ellsworth, "that there was a material difference between the cases of making war and declaring peace",[25] that it did not consider Congress as vested with the power to make peace unless given express authority. The Convention declined emphatically to give Congress this express authority, but, on the other hand, did consider the power of making peace as belonging under the treaty-making power to the President and

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[22] Madison's Journal (Hunt ed.), II, 330.
[23] Ibid.
[24] Ibid., 333-334.
[25] Ibid., 188. "It is not at all necessary that the power of declaring war and that of making peace are vested by a Constitution in the same hands." Oppenheim, International Law, II, 283-284. "The power to declare war does not necessarily include that of making a treaty of peace. . They are generally associated together, though not always". Baker, Halleck's International Law, I, 329.

Senate. This is also the view expressed by Justice Story, when he said that the proposal to add the power "to make peace" to the power already given to Congress "to declare war" was unanimously rejected, "upon the plain ground that it more properly belonged to the treaty-making power."[26] Ex-Justice Hughes recently made practically the same statement,[27] and other well known authorities on American constitutional law likewise hold that the Constitution vests the power of making peace, not in Congress, but in the President and the Senate.[28]

It is significant in this connection, not only that the recent claims to a power in Congress of declaring peace are entirely without precedent and contrary to the best interpretations of the Constitution, but also that such claims are refuted by specific declarations by Congress itself. Thus, every important legislative enactment of Congress during the recent war which contained any reference to the conclusion of peace, shows that Congress itself contemplated no possibility of terminating the state of war through its own action. Two of the measures -- the Food and Fuel Control Act and the Trading with the Enemy Act -- apparently considered the President alone vested with considerable authority in that regard, the former declaring that the provisions of the act should cease to be in effect "when the existing state of war . . . shall have terminated, and the fact and date of such termination shall be

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[26] Story, Commentaries on the Constitution, II, 88.

[27] In Central Law Jour., LXXXV, 206 (Sept. 21, 1917).

[28] For example, Schouler says that the power of Congress under the Confederation "embraced clearly the determination of both war and peace, while that of the Congress of our Constitution is in expression confined to war alone, since the full treaty-making power is lodged by the latter instrument (which makes no mention of declaring peace at all) with the new branch of government, the Executive, subject to a two-thirds ratification in the Senate." Constitutional Studies, 137.

ascertained and proclaimed by the President"; the latter that "the words 'end of the war', as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, *unless the President shall, by proclamation, declare a prior date*, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this Act."[29]

Other measures specifically contemplated the termination of the war by means of a treaty of peace. Thus, the Emergency Shipping Fund Act provided that the authority granted in that act to the President should cease "six months *after a final treaty of peace is proclaimed* between this Government and the German Empire"; the Railway Control Act required that Federal control should not continue longer than "one year and nine months next *following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace*"; the Overman Act was to terminate "six months *after the termination of the war by the proclamation of the treaty of peace*, or at such earlier time as the President may designate"; and the Control of Communications Act provided that control of the telegraph and telephone systems "shall not extend beyond the date of the *proclamation by the President of the exchange of ratifications of the treaty of peace*."[30]

It seems clear, therefore, that a formal treaty of peace is the only method contemplated by the Constitution for the termination of a foreign war and the restoration of peace, as it has heretofore been the only method ever suggested or actually employed

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[29] Act of Aug. 10, 1917 (Sec. 24); Act of Oct. 6, 1917 (Sec. 2). Wigmore, *Source-Book of Military Law and War-Time Legislation*, 512, 544.

[30] Act of June 15, 1917; Act of Mar. 21, 1918 (Sec. 14); Act of May 20, 1918 (Sec. 1); Joint Resolution of July 16, 1918. Wigmore, *op. cit.*, 484, 583, 586, 602.

in practice. The conclusion of peace rests therefore, in the United States, with the President and the Senate, as the treaty-making power.

Chapter XIV.

Powers with regard to a Treaty of Peace.

Since the conclusion of a treaty of peace is the only method by which a foreign war may be terminated by the United States,[1] it is necessary to note the powers of the President in that connection. In the first place, while the Senate shares the treaty-making power with the President and therefore enjoys considerable power in connection with the definitive conclusion of peace, certain preliminaries may be undertaken that are within the province of the President alone. These are the armistice and the preliminary protocol.

An armistice, strictly speaking, merely provides for a temporary suspension of hostilities, but, if general in its scope, it is usually entered into "with a view to negotiations for peace";[2] while a preliminary protocol is a preliminary settlement indicating the lines along which the peace negotiations are to be conducted.[3] The two cannot always be clearly differentiated, however, in that the latter may also provide for the suspension of hostilities, and both are generally used "as devices of the executive department for reaching a basis of negotiations without awaiting the difficult and delayed conferences necessary for the final treaty."[4] Neither requires the ratification of the Senate before going into effect, each being considered as "a proper exercise of his war powers by the Pre-

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[1] See preceding chapter.
[2] Lawrence, Principles of International Law, 564-567; Davis, Elements of International Law (4th ed.), 341.
[3] Cf. Benton, International Law and Diplomacy of the Spanish-American War, 226-228.
[4] Ibid., 227.

sident".[5] Both illustrate also the power of the President to enter into important international agreements without the consent of the Senate, in that through them he may not only determine as to the continuance or termination of hostilities, but may also lay down the conditions to be imposed upon the hostile power and practically commit the nation to a particular line of policy in the final peace conference.

President Madison sought in this way to bring about a termination of the war of 1812 almost as soon as it was begun. Jonathan Russell, the American chargé d'affaires in London, acting under instructions from Secretary of State Monroe issued only a few days after the declaration of war by Congress,[6] made two attempts to arrange an armistice in the early fall of 1812.[7] Although these attempts were unsuccessful, the British government declining to consent to an armistice on the conditions named, they were useful in clarifying the issues of the war, in that Monroe selected from among the "many just and weighty causes of complaint against Great Britain", the orders in council and the impressment of seamen as those "considered to be of the highest importance."[8]

The power of the Executive thus to define the issues of the war and to determine how far to yield in the interests of peace, was further illustrated when the counter-proposal of the British Government for a cessation of hostilities was rejected, on the ground that it was based on the repeal of the orders in council

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[5] Foster, Practice of Diplomacy, 318.

[6] Monroe to Russell, June 26, 1812. Am. State Papers, For. Rel., III, 585-586; see also instructions of July 27. Ibid., 586.

[7] Russell to Lord Castlereagh, Aug. 24, Sept. 12, 1812. Ibid., 589, 591.

[8] Ibid., 585.

alone and disregarded the question of impressment.[9] "It will be seen from this", says an eminent historian, "that Madison and Monroe continued the war on the question of impressment alone."[10]

The power of the President, as Commander-in-Chief, not only to terminate hostilities by arranging an armistice, but also to formulate such conditions for the armistice as to bind the nation to a particular policy in the peace conference, was clearly demonstrated in 1898, when in response to the Spanish request for terms of peace, President McKinley embodied his conditions in the protocol of August 12, which he authorized the Secretary of State to sign on the part of the United States.[11]

This protocol not only provided for an immediate suspension of hostilities and a subsequent peace conference to arrange the final terms, but stipulated that Spain should relinquish her claim to sovereignty over Cuba, cede Porto Rico and an island in the Ladrones to the United States, and evacuate these places immediately. The final disposition of the Philippines was to be left to the peace conference, the United States meanwhile to occupy and hold the city, bay, and harbor of Manila.[12] The protocol thus took on the character of much more than a preliminary agreement governing the termination of hostilities, but committed the United States to a certain very definite policy in the peace conference and approached very closely to a definitive treaty of peace.[13]

Similarly, the armistice conditions imposed upon Austria-

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[9] Warren to Monroe, Sept. 30, 1812; Monroe to Warren, Oct. 27, 1812. Am. State Papers, For. Rel., III, 595-597.

[10] Channing, History of the United States, IV, 480; cf. Updyke, Diplomacy of the War of 1812, 136-139.

[11] For. Rel. 1898, 825.

[13] Cf. J. B. Moore, in Pol.Sci.Quar., XX, 391-392; Moore's Digest, V, 213; Crandall, Treaties: Their Making and Enforcement, 103-104.

[12] See text of protocol, For. Rel. 1898, 828-830.

Hungary and Germany by President Wilson in 1918,[14] not only laid down terms which safeguarded the victory of the Allies in a military and naval sense, but, as embodying the famous "fourteen points", were generally understood to have committed the United States to a definite political policy in the peace conference, for his supposed departure from which in that conference the President has since undergone the bitterest criticism.

Having the power, through the armistice and the preliminary protocol, thus to terminate hostilities and to a considerable extent define the future peace conditions, the President may also, on his own authority alone, undertake measures which presume the virtual ending of the war and the existence of a state of peace. President McKinley, having proclaimed the suspension of hostilities with Spain in accordance with the protocol of August 12, 1898, immediately raised the blockade of the ports of Cuba and Porto Rico, and on August 18 ordered 100,000 of the volunteers or as near that number as practicable, to be mustered out.[15] President Wilson likewise ordered a general demobilization immediately after the signing of the armistice,[16] and lifted many of the war-time restrictions before the definitive conclusion of peace,[17] thus assuming, as he might, that the armistice was something more than a mere suspension of hostilities.

It might seem that the President, through such exercise

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[14] The texts of these may be conveniently found in N. Y. Times Current History Mag., IX, 364-368, 396-397 (Dec., 1918).

[15] Message to Congress, Dec. 5, 1898. Richardson, *op. cit.*, X, 174-175.

[16] Demobilization was virtually completed by Oct. 14, 1919, the army having by that time been reduced to less than 300,000 men. N. Y. Times Current Hist. Mag., XI, 230 (Nov., 1919).

[17] Such as restrictions on the use of food and fuel, on trade and industry, and on the manufacture of beverages. *Supra*, 235, note 20.

of power as has been noted, could, of his own authority alone, not only terminate hostilities, but bring about an actual termination of the state of war. Thus, in 1898, many neutral powers treated the protocol of August 12 as practically ending the war between the United States and Spain, and permitted public vessels of the United States to enter and use their ports freely as in time of peace.[18] So also it was reported in March, 1919, that the American peace delegation at Paris was considering bridging over the period between the signing of the peace treaty and its ratification by the Senate, by a modus vivendi declaring the war ended as of date of signature, so as to terminate the war legislation and enable an earlier return to normal conditions.[19]

It was even solemnly held in a court decision rendered at about the same time, that the "war was brought to a close when the armistice was signed", because President Wilson, in announcing the armistice to Congress, used the words, "The war thus comes to an end."[20] In numerous other cases involving war-time legislation, eminent counsel argued that the state of war was terminated by the signing of the armistice and other acts of the President; and on June 10, 1919, Representative Dyer (Massachusetts), a member of the House Judiciary committee, cabled the President to "exercise the authority which I am sure you possess" to proclaim the war ended and demobilization completed, and thereby prevent war-time prohibition from going into effect.[21]

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[18] Moore's Digest, VII, 335.

[19] Associated Press dispatch, Mar. 15, 1919.

[20] Federal Judge Walter Evans, in a decision handed down in Louisville, Ky., Mar. 24, 1919. Reported in Chicago Tribune, Mar. 25, 1919. The peace resolution passed by the House, Apr. 9, 1920, likewise referred to these words of the President as authority for declaring the war ended. Supra, 256, note 12.

[21] Chicago Tribune, June 11, 1919.

However, the better opinion is that the President alone cannot, by a protocol, proclamation, or other act, bring about the termination of a state of war and the existence of a state of peace. Thus, Attorney-General Griggs in 1898 held that the signing of the protocol of August 12 and the suspension of hostilities did not terminate the state of war between the United States and Spain;[22] Attorney-General Palmer likewise ruled in 1919 that a state of war could not be terminated by act of the President alone, but only by a treaty of peace;[23] and President Wilson himself declined to attempt any such exercise of power, declaring "not only that in my judgment I have not the power by proclamation to declare that peace exists, but that I could in no circumstances consent to such a course prior to the ratification of a formal treaty of peace."[24]

Finally, the courts have definitely decided that the signing of an armistice is not equivalent to the termination of a state of war. Judge Hand, of the United States District Court of New York, pointed out that "so long as the treaty of peace is not ratified, there is some chance of the resumption of hostilities", even though that chance might be very slight;[25] while the Supreme Court likewise unanimously held that the cessation of hostilities in the recent war by means of the armistice did not mean the "conclusion of the war", and pointed to various "facts of public knowledge" which showed the war emergency to be still in existence.[26]

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[21] Chicago Tribune, June 11, 1919.

[22] 22 Op. Atty. Gen., 190, 191.

[23] See his ruling on the War-Time Prohibition Act, in N.Y.Times, Aug. 28, 1919; also his telegram to Judge Evans, in case cited in this chapter, note 20.

[24] Letter to Senator Fall, Aug. 20, 1919. N.Y.Times, Aug. 22, 1919.

[25] See decisions rendered by him, in cases involving the validity of wartime prohibition and wartime cable control, Jan. 20 & Aug. 20, 1919. N. Y. Times, Jan. 21, Aug. 21, 1919.

[26] Hamilton v. Kentucky Distilleries & Warehouse Co., decided Dec. 15, 1919, upholding validity of the War Time Prohibition Act. Reported in Chicago Tribune, Dec. 16, 1919.

In the definitive conclusion of peace through a formal treaty, the President, although he is of course required to obtain the "advice and consent" of the Senate before putting a treaty into effect,[27] has practically complete control of all the other functions and processes of treaty-making.[28] In the first place, the President alone may appoint the commissioners who are to negotiate the treaty of peace, and he is not required to submit their nominations to the Senate for confirmation. This power rests upon the now well-recognized right of the President to use, at his discretion, special agents of a diplomatic or semi-diplomatic character -- a right which one writer[29] points out has four bases: (1) a presumptive legal basis in the acts of Congress giving the President a contingent fund which he may expend for foreign intercourse without specific accounting;[30] (2) the recognized right of the President to take the initiative in foreign affairs;[31] (3) the general practice of govern-

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[27] Constitution, Art. II, Sec. 2, Cl. 2.

[28] "As for making and declaring peace, the power . . . pertains no longer to Congress, but is lodged for negotiation and conclusion in the President." Schouler, Constitutional Studies, 140. "As the war power is shared between the President and Congress, but Congress does not share in the executive power, the breadth of the President's prerogatives as to the closing of war becomes of special importance. The limits imposed directly by the Constitution are few, its main one being the requirement of the consent of the Senate . . . To make a declaration of war requires the assent of Congress as well as of the President. To end a war, it is enough for him to obtain the assent of the Senate, if he acts under the treaty-making power." S. E. Baldwin, in Am. Jour. Int. Law, XII, 13.

[29] H. M. Wriston, "Presidential Special Agents in Diplomacy", in Am. Pol. Sci. Rev., X, 481-499, esp. 482-488.

[30] As the earliest acts of this sort may be mentioned the Acts of July 1, 1790; Feb. 9, 1793; May 1, 1810. Annals of Cong., 1 Cong., II, App., 2232; 2 Cong., App., 1411; 11 Cong., II, App., 2585.

[31] Supra, ch. II.

ments under international law;[32] and (4) necessity.[33]

Prior to 1815, the names of such special agents or commissioners chosen to negotiate treaties were generally submitted to the Senate for confirmation.[34] According to this practice, President Madison even summoned the Senate in special session in May, 1813, to consider his course in accepting the Russian offer of mediation, and to confirm the peace commissioners he had already appointed and sent on their way. The Senate confirmed the nominations of John Quincy Adams and Senator James Bayard, but rejected that of Secretary of the Treasury Albert Gallatin, on the ground that "in the opinion of the Senate, the powers and duties of the Secretary of the Department of the Treasury and those of an Envoy Extraordinary to a Foreign Power, are so incompatible that they ought not be and remain united in the same person."[35] Upon the failure of this attempt to open peace negotiations, the President appointed another peace commission in January, 1814, again submitting the names to the Senate for confirmation.[36]

Since 1815, however, it has been very unusual to submit

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[32] "There seems to be no reason why the government of the United States cannot, in conducting its diplomatic intercourse with other countries, exercise powers as broad and general or as limited and peculiar, or special, as any other government. . . In fact, there has been no limit placed upon the use of a power of this kind, except the discretion of the sovereign or ruler of the country." Report of Senate Committee on Foreign Relations, 1893, quoted by H. M. Wriston, op. cit., 486-487.

[33] See H. M. Wriston, op. cit., 487-488.

[34] Crandall, Treaties: Their Making and Enforcement, 75-76.

[35] Updyke, Diplomacy of the War of 1812, 146-148.

[36] This commission consisted of John Quincy Adams, James Bayard, Henry Clay, Jonathan Russell, and Albert Gallatin, the first four names being submitted to the Senate on Jan. 14 and confirmed Jan. 18. Gallatin's name was added on Feb. 8, and confirmed the next day without serious opposition, he being no longer in the Cabinet. Ibid., 167-168.

the appointments of treaty negotiators to the Senate at all,[37] and especially so with regard to peace commissioners. President Polk even felt it necessary to keep secret for a time his selection of Nicholas Trist as peace commissioner in 1847,[38] although he vested Trist with unusual powers, not only to accompany the army and negotiate peace at a favorable opportunity, but also to control the military and naval operations.[39] His later appointments of Sevier and Clifford to negotiate the final treaty were, however, submitted to the Senate for confirmation, though it should be noted that Sevier was in reality selected for the permanent post of minister to Mexico with authority to complete the peace treaty negotiations, and that Clifford was added merely because of Sevier's illness.[40] President McKinley likewise appointed the peace commissioners of 1898 without consulting the Senate;[41] while President Wilson in 1918, although Congress was in session, merely "announced" the peace delegation in a White House statement, and took the un-

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[37] For instances of such appointments without the consent of the Senate, see Moore's Digest, IV, 453-457.

[38] Diary of James K. Polk, II, 468, 483; cf. II, 262, 268,273.

[39] "Should he (Trist) make known to you in writing that the contingency has occured in consequence of which the President is willing that further active military operations should cease, you will regard such notice as a direction from the President to suspend them until further orders from this department." Secret orders to Gen. Scott and Commodore Perry, quoted by H. M. Wriston, op. cit., 495.

[40] Diary of James K. Polk, III, 378-383, 389-391. The treaty had been ratified by the Senate, Mar. 10, 1848, with amendments that required new negotiations.

[41] However, the commissioners were appointed and the treaty of peace completed during a recess of Congress. But in 1901, President McKinley, without consulting the Senate, although it was then in session, appointed W. W. Rockhill as special commissioner to China, invested with full power to negotiate with the representatives of the other allied powers and of China concerning a settlement of the questions arising out of the Boxer Rebellion.

precedented step of including himself.[42]

Having the power to appoint peace commissioners with or without the consent of the Senate, the President is not restricted in his choice, but may select whom he will, without qualification. Public opinion seems to expect, however, that distinguished men of both parties should be chosen, and one of the severest criticisms of President Wilson was his apparent selection of men who would reflect merely his own personal views. President Polk likewise found great difficulty in selecting a commissioner satisfactory to the country, probably one reason for the choice of a person in a somewhat obscure position.[43]

There seems also to be a considerable body of opinion that, since the Senate is constitutionally a coordinate part of the treaty-making power, it should be represented on the commission to negotiate peace. President Madison probably deferred to this sentiment in appointing Senator Bayard, a Federalist, and Henry Clay, formerly in the Senate but at that time Speaker of the House, to the peace commission of 1814. President McKinley went so far in that respect as to give the Senate a majority on the peace commis-

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[42] Together with Secretary of State Lansing, Henry White, Edward M. House, and Gen. Tasker H. Bliss. Official U. S. Bulletin, Nov. 19, Nov. 30, 1918. President Wilson's decision to participate personally in the peace negotiations at Paris raised again the interesting, though purely academic question as to the President's constitutional right to leave the jurisdiction of the United States during his term of office. It is worthy of note that Hamilton's plan for a constitution definitely contemplated the consent of Congress for the absence of the President from the United States, and even then for the exercise of his powers by the Vice-President during such absence. See Elliot's Debates, V, 587. The law and precedents governing the President's right to leave the country are discussed by Park Benjamin, in The Independent, Mar. 29, 1919. See also opinion of ex-Attorney General Wickersham, in N. Y. Times, Nov. 27, 1918; and Taft, Our Chief Magistrate and His Powers, 50-51.

[43] Diary of James K. Polk, II, 466. Nicholas Trist was chief Clerk of the Department of State when appointed peace commissioner.

sion of 1898;[44] and President Wilson's entire disregard of the Senate in making up the peace commission in 1918 called forth especially severe criticism, as though it were an utter contempt for the constitutional position and rights of that body.

As a matter of fact, though Senators have been quite commonly appointed on commissions to negotiate treaties, including treaties of peace, there is excellent authority for the view that their appointment to such missions is not only inexpedient and improper, but also contrary to the constitutional principle that no civil officer of the United States shall at the same time be a member of either house of Congress.[45] President Monroe, for example, stated in 1818 that he "did not approve the principle of appointing members of Congress to foreign missions, but, as it had been established in practice from the first organization of the present Government, and, as the members of Congress would not be satisfied with the opposite principle, he did not think it proper to make it a rule for himself."[46]

The Senate itself has upon occasion taken a positive stand against the participation of members of that body in treaty negotiations. Thus, in 1898, the Senate declined to confirm the

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[44] Cushman K. Davis (Minn.), Republican, chairman of the Senate Committee on Foreign Relations; William P. Frye (Me.), Republican; and George Gray (Del.), Democrat. The other members of the commission were William R. Day, who resigned as Secretary of State in order to head the commission, and Whitelaw Reid, former minister to France.

[45] "No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office." Constitution, Art. I, Sec. 6, Cl. 2.

[46] Memoirs of John Quincy Adams, IV, 72.

nominations of Senators Hoar, Cullom, and Morgan to the Hawaiian Commission "upon the ground that it would no longer consent to the selection of members of this body to negotiate important treaties that were to be reported to the Senate."[47] In fact, the feeling in the Senate was at that time so strong against that practice that the Judiciary Committee "almost unanimously" contemplated reporting a bill or resolution prohibiting it for the future, and only refrained from doing so because it was thought that such action might be construed as a discourtesy to those Senators who had acted under such appointments. The committee instructed Senator Hoar, however, to see the President and say that it hoped the practice would be discontinued; to which suggestion the President responded by assuring Senator Hoar that it would not occur again, although he called attention to the difficulty of getting suitably qualified men outside of the Senate or House.[48]

In 1903 the question again came before the Senate, and the judgment was almost unanimously as before. Senator Tillman said: "We had the Paris treaty or the Spanish or Philippine treaty negotiated by Senators whose votes, no doubt, were influenced by the fact that they were on that commission. I do not see why we should palter with this thing any longer. Probably we cannot convince the Executive that this practice is improper and contrary to the will of

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[47] Statement of Senator Hale, in U. S. Senate, Feb. 26, 1903. Cong. Record, 57 Cong., 2 Sess., 2695. The Senators nevertheless served, their position being stated by Senator Cullom as follows: "We went out by appointment of the President; but there was a doubt about it, and the Judicial Committee of the Senate, in view of the doubtful attitude which we occupied as receiving appointments from the President while being members of the Senate, thought it best not to act upon our confirmation at all; and they were not acted upon. We were never confirmed by the Senate as a matter of fact." Ibid., 2695.

[48] Ibid., 2695, 2698.

the Senate, unless it is forbidden by law." He therefore offered an amendment to the provision under discussion providing, "that in making appointments to any such commission no Senator or Member of the House shall be eligible."[49]

Although the amendment went out on a point of order, Senator Hale protested vigorously against the practice; Senator Bacon said it was "distinctly in opposition to the express policy, if not the express command of the Constitution of the United States"; Senator Hoar concurred in this view, and in addition stated that "hardly a more dangerous practice can be conceived than this one"; and Senator Allison said, "I am in sympathy with the general suggestion. . . I do not believe a Senator or Representative should be appointed."[50] Senators Foraker and Teller were not ready to restrict Senators from serving on such commissions under all circumstances, but thought the practice as a rule "reprehensible".[51] Of all those who participated in the discussion, only Senators Aldrich, Platt (Connecticut), and McComas defended the practice, and opposed any limitation on such service by members of the Senate.[52]

It would therefore seem that the recent outbursts of criticism against President Wilson, in the Senate and elsewhere, for his failure to appoint members of that body to the peace commission, are based on rather flimsy pretexts; and that, as a matter of fact, while criticism of the personnel of the commission might be

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[49] Cong. Record, 57 Cong., 2 Sess., 2696. The provision under consideration was one in the Sundry Civil bill authorizing the appointment of a commission to negotiate concerning rates of exchange between silver and gold using countries.

[50] Ibid., 2695, 2696, 2697, 2698.

[51] Ibid., 2696, 2697.

[52] Ibid., 2696, 2698. Apparently the positive assurance by Senator Aldrich that no such appointments would be made in the case under consideration had a great deal to do with the abandonment of a specific prohibition.

justified on other grounds, that based on any constitutional or inherent right of the Senate to representation on such commission is condemned, both by the Constitution and by the unprejudiced opinion of the Senate itself.

In the second place, the President has entire control of the peace negotiations on the part of the United States. He lays down the principles that are to form the basis of negotiation, he determines whether to yield or to stand firm on a disputed point, and he decides the wisdom and expediency of compromises. The power and responsibility of the President in these respects are the same, whether he directs the negotiations from Washington, as did McKinley in 1898, or himself participates in the peace conference, as did Wilson in 1919. His power is only the more strikingly apparent in the latter case.

President McKinley was constantly in touch with the peace commissioners at Paris in 1898, and did not hesitate to make new demands and impose additional conditions during the progress of the negotiations, even though he was not personally present. With regard to the disposition of the Philippines, for example, concerning which the Spanish commissioners had expected an opportunity to negotiate, President McKinley's original instructions were to demand the cession of the island of Luzon only. Later, however, additional instructions were sent that "the cession must be of the whole archipelago or none. The latter is wholly inadmissible, and the former must therefore be required." The American commission was divided as to the wisdom and justice of this demand,[53] and sought, moreover, to rest the claim of the United States to any part

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[53] See For. Rel. 1898, 932-935, 945-948.

of the Philippines on the grounds of indemnity, the welfare of the islands, the "broken power of Spain", and the "anarchy" that would result from our complete withdrawal; while the President apparently desired to press the claim "by right of conquest", holding that the conquest of the entire archipelago had been accomplished by Dewey's destruction of the Spanish fleet in Manila Bay. In both matters, the commission yielded, of course, to the views of the President.[54] President Wilson's "domination" of the peace commission of 1919 was not more complete, nor is there anything improper about such domination, since it is the President who is alone responsible for the results of the negotiations.

The Senate has, of course, the right to "advise and consent" to all treaties, and that has sometimes been interpreted to mean that the Senate has a right to "advise" and to be consulted before or during the course of the negotiations. There have been a few occasions upon which the President has sought the previous advice of the Senate, or has informed that body as to pending negotiations.[55] President Polk in 1846 referred to that practice as "eminently wise", and said that since the Senate is a branch of both the treaty-making and war-making powers, "it may be eminently proper for the Executive to take the opinion and advice of that body in advance upon any great question which may involve in its

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[54] Benton, International Law and Diplomacy of the Spanish-American War, 241, 243; See For. Rel. 1898, 935, 937, 940, 941. A recent interesting explanation of President McKinley's demand for the whole of the Philippines is to the effect that while his mind was not yet made up on the point, he received a communication from Lord Salisbury warning him that Germany was preparing to take over the islands if the United States withdrew, that such a step would probably precipitate a world war, and that in the interests of peace and harmony it would be best for the United States to retain the whole group. Latané, From Isolation to Leadership, 85.

[55] For a list of these, see Finley & Sanderson, The American Executive and Executive Methods, 280-282.

decision the issue of peace or war."[56]

That practice has, however, been only rarely resorted to in later times,[57] and generally the "advice" of the Senate, as well as its "consent", has been given only after the negotiations have been completed and the final treaty laid before it by the President. There has been even less disposition to interpret that phrase ("by and with the advice and consent of the Senate") as giving the Senate any right to participate as a body in the negotiations or to offer its advice as to the course and subject-matter of the negotiations. The determination of those has been generally held to be the function of the President alone, and only recently has there been any serious attempt to assert power on the part of the Senate to interfere or to interject its "advice" during the course of important treaty negotiations, especially those for the conclusion of peace.

Such an attempt was made, however, during the recent treaty negotiations at Paris, when Senator Knox, on June 10, 1919, in an attempt to force the separation of the covenant of the League of Nations from the treaty of peace then being negotiated, proposed a resolution declaring, among other things, that the Senate of the United States, "being a coequal part of the treaty making power of this government and therefore coequally responsible for any treaty which is concluded and ratified", was "deeply concerned" over the treaty under negotiation; that it would regard a treaty confined to

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[56] Message to Senate, June 10, 1846. Richardson, op. cit., IV, 449.

[57] It is significant that President Wilson, in announcing his famous "fourteen points" as the necessary conditions of peace, addressed Congress as a whole, and not the Senate alone. Address to Congress, Jan. 8, 1918. McKinley, Collected Materials for the Study of the War, 20-22.

"the attainment of those ends for which we entered the war", as "fully adequate for our national needs"; that the conclusion of a "full and complete peace"was the paramount, if not the sole duty of the peace conference; that the question of a League of Nations should be reserved for "future separate and full consideration" by the people of any nation; and that the adoption by the peace conference of "the foregoing reasonable limitations and positions" would facilitate the early acceptance of the treaty by the Senate.[58]

This attempt to **inject** the advice of the Senate into the peace conference at Paris, and to influence the course of the negotiations, was directly contrary, not only to the traditional view that treaty negotiation is a function belonging solely to the President, but also to the expressed views of Senate leaders on former occasions that the Senate should hold itself distinctly apart from these negotiations, and only take action when the treaty is completed and laid before it, or when its advice is sought by the President.

Thus, Senator Spooner, generally considered to be one of the best constitutional lawyers of his time, said with regard to this point: "The Senate has nothing whatever to do with the negotiation of treaties or the conduct of our foreign intercourse and relations save the exercise of the one constitutional function of advice and consent which the Constitution requires as a precedent condition to the making of a treaty. . . From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases -- and they are multifarious -- of the conduct of our foreign

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[58] See text of resolution in Cong. Record, 66 Cong., 1 Sess., 935. The resolution was, however, never acted upon.

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relations exclusively in the President. And he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined."[59]

Likewise, Senator Lodge, who recently has bitterly criticized President Wilson for "ignoring" the Senate in negotiating the Treaty of Versailles, had this to say in 1906: "No one, I think, can doubt the absolute power of the President to initiate and carry on all negotiations. . . The action of the Senate becomes operative and actually effective only when a treaty is actually submitted to it. . . We (the Senate) have no possible right to break suddenly into the middle of a negotiation and demand from the President what instructions he has given his representative. That part of the treaty making is no concern of ours. . . It is a mere invasion of the powers and rights of the President if we are to plunge in at a stage of the negotiations where we have no business whatever and demand from him the instructions which he has given to his properly appointed representatives. When the treaty made by those representatives comes before us, then is the time, and not before, in which we can properly ask for information in regard to all that has led up to it."[60]

In the light of these strong expressions of opinion, it would seem that much of the recent criticism of President Wilson by Senator Lodge and his followers, is entirely hypocritical and unjustified, especially in so far as it is based on the relative constitutional position and powers of the Senate and the Executive

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[59] Cong. Record, XL, Pt. 2 (59 Cong., 1 Sess.), 1418 (Jan. 23, 1906).

[60] Ibid., 1470.

in regard to the making of treaties. However overbearing and tactless the President may have been in his relations to the Senate, clearly he has at no time in his negotiation of the Treaty of Versailles exceeded the traditional view of his constitutional powers nor encroached on those of the Senate.

The power of the President with regard to the conclusion of peace does not end with the negotiation and signature of the treaty.[61] The Senate must give its consent before the treaty can become fully effective and the state of war be actually terminated, but the fact that the Senate "advises and consents" to the ratification of a treaty is not conclusive, as the President alone can perform the final act of ratification. The Senate may amend a treaty, but the President may decline to accept these changes and refuse to ratify the amended treaty. He may withdraw a treaty from the Senate at any time during its consideration, and he may, if he chooses, even decline to ratify a treaty that has been approved by the Senate in its original form. In other words, while the "advice and consent" of the Senate is a condition precedent to ratification, it is not mandatory -- the President has the final word.[62]

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[61] The mere signing of the treaty is of some importance, since it operates to bring about a suspension of hostilities, if that has not already been done by a separate armistice or protocol. Hall, International Law, 554-555.

[62] Crandall, Treaties: Their Making and Enforcement, 97. "The President is so supreme under the Constitution in the matter of treaties, excluding only the Senate's ratification, that he may negotiate a treaty, he may send it to the Senate, it may receive by way of 'advice and consent' the unanimous judgment of the Senate that it is in the highest degree for the public interest, and yet the President is as free when it is sent back to the White House with resolution of ratification attached, to put it in his desk never again to see the light of day as he was free to determine in the first instance whether he would or would not negotiate it. That power is not expressly given to the President by the Constitution, but it inheres in the executive power conferred upon him to conduct our foreign relations, and it is a power which inheres in him as the sole organ under the Constitution through whom our foreign relations and diplomatic intercourse are conducted." Senator John C. Spooner, in U. S. Senate, Jan. 23, 1906. Cong. Record, XL, Pt. 2 (59 Cong., 1 Sess.), 1419.

It is therefore within the power of the President to determine the actual date for the termination of a war and the conclusion of peace. That is done by means of a proclamation, announcing the effectiveness of the treaty or the exchange of ratifications, in the case of a foreign war, or merely announcing the termination of armed resistance, in the case of a civil war. The actual exchange of ratifications, or the actual suppression of rebellion, apparently are not enough; there must be an official declaration of the event by the President. "The war commences when government officially says it has commenced, and it ends when government says it has ceased to exist";[63] and "government" in the latter case means the President.[64]

Thus, the war of 1812 was officially terminated on February 18, 1815, the war with Mexico on July 4, 1848, and the war with Spain on April 11, 1899, because of the President's proclamation of that date in each particular case. Only in the case of the war with Spain did that date correspond with the date of the actual exchange of treaty ratifications.[65] So also the Civil War is declared by the courts to have ended on April 2, 1866, with respect to all the insurrectionary states except Texas, and on August 20, 1866, with respect to Texas, because of the proclamations of the President de-

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[63] Glenn, The Army and the Law, 64.

[64] "It is necessary to refer to some public act of the political departments of the government to fix the dates; and for obvious reasons, those of the executive department. . . must be taken." The Protector, 12 Wall., 700, 702 (1871). Of course the Court was here referring particularly to a civil war.

[65] For the proclamations, see Richardson, op. cit., I, 560; IV, 627; For. Rel. 1898, 831. In the first case, the treaty was signed Dec. 24, 1814, and ratifications exchanged Feb. 17, 1815; in the second, the first treaty was concluded Feb. 2, 1848, and ratifications of the amended treaty exchanged May 30; in the last case, the treaty was signed Dec. 10, 1898, and approved by the Senate Feb. 6, 1899.

claring armed resistance at an end as of those dates, although the last rebel army surrendered in May, 1865.[66]

Recent war legislation also shows clearly that Congress contemplated that the date for the termination of the state of war with Germany and Austria-Hungary should be determined by proclamation of the President. Thus, there were express provisions declaring that "the fact and date of such termination shall be ascertained and proclaimed by the President", or that the end of the war "shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace". In other cases, it was provided that the acts should terminate a certain time "after a final treaty of peace is proclaimed", or "following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace", or similar language.[67]

The powers of the President with regard to the conclusion of peace are therefore very extensive and quite definite. He may, on his own authority, undertake preliminary measures and enter into preliminary agreements for the termination of hostilities; through these preliminary measures, he may to a considerable extent lay down the conditions of permanent peace and commit the nation to them. With regard to the definitive treaty of peace, the President has entire control of the personnel of the peace commission, and entire control of the peace negotiations; he is required to obtain the "advice and consent" of the Senate before putting a treaty of peace into final effect, but when that is obtained, he is again absolute as to the final acceptance of the treaty, and as to the time for its becoming effective.

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[66] The Protector, 12 Wall., 700, 702 (1871); Lamar v. Browne, 92 U. S., 187, 193 (1875); Birkhimer, Military Government and Martial Law, 367-368; Richardson, op. cit., VI, 429-432, 434-438.

[67] Supra, 261-262.

Chapter XV.

Powers with regard to Reconstruction.

With the termination of the emergencies of war, it might be expected that the exercise of the "war powers" should immediately cease. Ex-Justice Hughes thus expressed the view, shortly after the signing of the armistice at the close of the recent war, that in the harnessing of our strength for war we were acting "under the Constitution and not in violation of it", but that to use the war powers to control peace conditions was a proceeding "essentially vicious and constituting the most serious offense against our institutions."[1] Elihu Root, in his argument before the Supreme Court in the recent prohibition cases, likewise contended that the right to exercise the war powers no longer existed when the war emergency had passed. "The question", he said, "is much confused by a certain vague and colloquial use of the term 'war powers'. War confers no powers upon Congress. The powers are all in the Constitution of the United States. The condition of war does create exigencies which make appropriate the exercise of powers not otherwise existing. . . On the other hand, when the war has progressed to an extent that the enemy has been forced into submission and there is no longer an army or navy to be raised and maintained the power ends because the exigency no longer exists."[2]

It is generally recognized, however, that the return to normal peace conditions can be made only gradually, that there must be a period of readjustment and reconstruction during which certain of the war powers must of necessity continue to be exercised. Thus

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[1] N. Y. Times, Nov. 29, 1918.
[2] Ibid., Nov. 19, 1919.

Mr. Hughes admitted, in the speech quoted above, that "whenever, during the war, extraordinary powers were fittingly exercised and governmental control was assumed for war purposes, the readjustment to conditions of peace must of course be effected gradually and with the circum~~s~~spection essential to the protection of all the public and private interests involved". Professor Willoughby also remarks that "the power to wage war carries with it authority not only to bring it to a full conclusion, but, after the cessation of active military operations, to take measures to provide against its renewal";[3] and the Supreme Court long ago held that "the power (to carry on war) is not limited to victories in the field. . . It carries with it inherently *the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress*."[4]

Although this opinion of the court referred particularly to the conditions resulting from the Civil War, there would here seem to be some warrant for the belief that the President, who as Commander-in-Chief has the power of waging war, is also entrusted with such powers as may be necessary to effect a complete return to the normal conditions of peace.

Some of these powers, such as the resumption of friendly relations with the opposing belligerent, may result from an ordinary constitutional function, whose exercise in this case is made necessary in order to completely restore the status of peace.[5] In other cases, however, the termination of war and the consequent problems of reconstruction may bring about new situations which can only be

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[3] *On the Constitution*, II, 1212.

[4] *Stewart v. Kahn*, 11 Wall., 493, 507 (1870).

[5] That is, the appointment and reception of accredited diplomatic agents.

met by the assumption of unusual authority and the exercise of extraordinary powers. Thus, the measures undertaken by Presidents Lincoln and Johnson in reorganizing and reconstructing the governments of the insurrectionary states of the South by executive orders and through military commanders,[6] were upheld by the Supreme Court as a legitimate exercise by the President of his powers as Commander-in-Chief, subject to final determination by Congress.[7]

The successful conclusion of a war frequently results in the acquisition of additional territory, and the determination of the status, rights, and government of such acquired territory is one of the problems of the reconstruction period. It is a well-recognized constitutional principle in the United States that, when territory is annexed by the United States or comes in any manner under its jurisdiction, Congress has an absolute right, from the moment of such acquisition, to determine the political rights and governmental organization of that territory.[8] In the case of territory acquired by purchase or other peaceful means, Congress has generally seen fit to exercise that right by conferring temporary but complete governmental power on the President, until it can itself provide for a definite system of government.

Thus, after the cession of Louisiana, an act was passed providing that, until Congress should otherwise provide, "all the military, civil, and judicial powers exercised by the officers of the existing government of the same, shall be vested in such person or persons and shall be exercised in such manner as the President

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[6] See Dunning, Reconstruction: Political and Economic, 35-39.
[7] Texas v. White, 7 Wall., 700, 730-731 (1868).
[8] Willoughby, On the Constitution, I, 403.

of the United States shall direct."[9] Under this provision, the President exercised complete governmental authority over Louisiana until October 1, 1804, when the territorial government created by Congress went into effect.[10] In almost identical language, Congress likewise vested the temporary government of Florida in the President,[11] all the powers of which were exercised by him through General Jackson as governor and through other subordinates until Florida was made a territory in 1822.[12] Alaska, acquired in 1867, was governed under the sole authority of the President until 1900, when Congress adopted a civil code and provided a form of civil government for that region;[13] while Hawaii was governed by the President for more than two years under the authority of the joint resolution of annexation.[14] The government of the Panama Canal Zone, established and carried on by the President at first under

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[9] Act of Oct. 31, 1803. Annals of Cong., 8 Cong., 1 Sess., App., 1245. Objections were made to this grant of power on the ground that the combination of all governmental powers in one man was unconstitutional, and that it made the President a despot. Thomas, Military Government in Newly Acquired Territory of the United States, 30-31; McMaster, History of the People of the United States, III, 9-10.

[10] Act of Mar. 26, 1804. Annals of Cong., 8 Cong., 1 Sess., App., 1293.

[11] Acts of Mar. 3, 1819 & Mar. 3, 1821. Ibid., 15 Cong., 2 Sess., II, App., 2534; 16 Cong., 2 Sess., App., 1809.

[12] Act of Mar. 30, 1822. Ibid., 17 Cong., 1 Sess., II, App., 2578; cf. Thomas, op. cit., 65-70, 95, 98.

[13] Act of June 6, 1900. 31 Stat. at L., 321. The President exercised his authority in Alaska principally through the army commanders and through the Secretary of the Treasury (Alaska having, by executive order, been made a revenue district). Thomas, op. cit., 279-280. Alaska was definitely organized as a territory by Act of Aug. 24, 1912. 37 Stat. at L., 512.

[14] Joint Resolution of July 7, 1898. 30 Stat. at L., 750. A territorial government was established Dec. 3, 1900, by Act of Apr. 30, 1900. 31 ibid., 141.

the authority of Congress,[15] was, upon the failure of Congress to continue that authority, nevertheless continued by authority of several executive orders,[16] until congressional sanction was again given in 1912.[17] "Beginning with a government which might be termed political, it ended as a government by executive order, controlled by one man answerable only to the President of the United States, through the Secretary of War."[18]

While the status and government of acquired territory are clearly subject to the jurisdiction and control of Congress, it would seem that another constitutional principle may be derived from these examples, namely, that in the absence of Congressional legislation, the President may exercise temporary governmental power on his own authority. In fact, the presumption seems to have existed from the time of the acquisition of Louisiana that the President could exercise such authority by virtue of his powers as Commander-in-Chief.[19]

In the case of territory acquired after conquest and occupation in war, the power of Congress likewise constitutionally

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[15] Acts of June 28, 1902 (Spooner Act) & Apr. 28, 1904. 32 Stat. at L., 481; 33 ibid., 429. The former authorized the President to establish judicial tribunals in territory acquired for the canal, in order to enforce the rules and regulations which he might deem necessary and proper for the preservation of order and public health; which authority was considered sufficient to permit the establishment of "such form of government as the President might determine." The latter act provided that the President should be vested with all the powers of government until the expiration of the 58th Congress, unless other provisions for a government were sooner made. See Goethals, Government of the Canal Zone, 11-20.

[16] Executive orders of Apr. 1, 1905; Nov. 17, 1906; April, 1907; Jan. 8, 1908. Goethals, op. cit., 43-50. The 58th Congress adjourned without making any further provision for the government of the Canal Zone.

[17] Panama Canal Act of Aug. 24, 1912. 37 Stat. at L., 560.

[18] Goethals, 6p. cit., 51.

[19] Willoughby, On the Constituion, I, 390; Thomas, op. cit., 31-32.

attaches from the moment of acquisition. However, the problem of the temporary government of such territory, in the absence of provision by Congress, is somewhat different from that in the case of territory acquired peacefully. It involves the question of the continuance of the military government already existing under the authority and direction of the President, or of the power to set up some other form of government under other authority.

President Polk, after the ratification of the treaty of peace with Mexico in 1848, at first held that he had no power to continue the governments established by him over New Mexico and California during the war, but that upon the definitive conclusion of peace, these governments "necessarily ceased to exist". He also held that he had no power to establish other temporary governments without the sanction of Congress. "The war with Mexico having terminated", he said, "the power of the Executive to establish or continue temporary civil governments over these territories, which existed under the laws of nations whilst they were regarded as conquered provinces in our military occupation, has ceased. By their cession to the United States Mexico has no longer any power over them, and until Congress shall act the inhabitants will be without any organized government."[20] In order to prevent anarchy and confusion, the President therefore recommended the immediate establishment of territorial governments in New Mexico and California, he himself proposing in the meantime merely to maintain a small military force in those regions in order to "hold the country and protect the inhabitants against Mexican, Indian, or other enemies who

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[20] Messages of July 6 & July 24, 1848. Richardson, Messages and Papers of the Presidents, IV, 589, 596.

might disturb them."[21]

The failure of Congress to provide a government for these newly acquired territories before adjournment, seemed to make necessary the establishment of a government by some other authority. Senator Benton, in a letter of August 27, 1848, addressed to the people of California, advised them to meet in convention, form a "cheap and simple" government, and take care of themselves until Congress should act. President Polk, considering this move "offensive" and "arrogant", and principally intended to make Colonel John C. Fremont (Benton's son-in-law) governor of an independent government in California, felt that some greater exercise of Executive power was necessary, if confusion, anarchy, and possible revolution were to be avoided. He therefore summoned his Cabinet to consider the "question of difficulty", namely, "what Government existed over the country until Congress should act, and what power to govern it the Executive possessed," and an agreement was reached that the temporary military governments established during the war should be regarded as governments _de facto_, still existing by the presumed consent of the people, and to which the people should be advised to submit.[22]

Accordingly, Secretary of State Buchanan, in a letter of October 7, 1848, drew up instructions to the people of California, in which he expressed the position of the Administration as follows: "The termination of the war left an existing Government, a Government _de facto_, in full operation; and this will continue with the presumed consent of the people, until Congress shall provide for

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[21] Richardson, _op. cit._, 589; _Diary of James K. Polk_, IV, 136.

[22] See Thomas, _op. cit._, 130; _Diary of James K. Polk_, IV, 136-137, 140-143.

them a territorial Government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing Government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest."[23]

Similar instructions were drawn up for the people of New Mexico by Secretary of War Marcy,[24] and President Polk himself announced the new policy to Congress in December, stating that "the very limited power possessed by the Executive has been exercised to preserve and protect them from the inevitable consequences of a state of anarchy. The only government which remained was that established by the military authority during the war. Regarding this to be a de facto government, and that by the presumed consent of the inhabitants it might be continued temporarily, they were advised to submit to it for the short intervening period before Congress would again assemble and could legislate on the subject."[25]

The same doctrine concerning the governmental power of the President was asserted also by the succeeding administration,[26] but there seemed to be a distinct effort on the part of the President in each case to emphasize the civil rather than the military authority of the governments so recognized as existing by necessity and presumed consent. The authorities apparently believed that "at the conclusion of the war the military government became merged into

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[23] Buchanan to Mr. Voorhies, agent of the Post-Office Department in California. Moore, Works of James Buchanan, VIII, 211-216, esp. 213; cf. Diary of James K. Polk, IV, 143, 146-149.

[24] Thomas, op. cit., 132-133.

[25] Message of Dec. 5, 1848. Richardson, op. cit., IV, 638.

[26] Thomas, op. cit., 211.

a sort of de facto civil government." Thus, President Polk selected General P. F. Smith as commander in California, because he was "a man of education and intelligence and possessed of much knowledge of civil government as well as of military command, and it was desirable to have such an officer in chief command in California in the present anomylous state of that country."[27]

During the administration of President Taylor, General Riley, then commanding officer in California, issued a proclamation (June 3, 1849), in which he sought to correct the impression that the de facto government was still military in character. "The military government ended with the war", he said, "and what remains is the civil government, recognized in the existing laws of California. Although the command of the troops in this department and the administration of civil affairs in California are, by the existing laws of the country and the instructions of the President of the United States, temporarily lodged in the hands of the same individual, they are separate and distinct."[28] President Fillmore likewise held that the civil and military departments in these temporary governments should be kept separate and distinct, and ordered the military governor of New Mexico not to interfere with civil and political affairs. "Temporary departure from this principle may be required occasionally, but it should close with the passing of the necessity. No necessity now seems to exist in New Mexico."[29]

While the President himself in these early cases based his claim to temporary governmental power upon the doctrine of

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[27] Diary of James K. Polk, IV, 149. Apparently Gen. Smith never acted as civil governor, however, but only as the senior commanding officer for a short time. Thomas, op. cit., 212.

[28] Thomas, op. cit., 211-212.

[29] Ibid., 146.

necessity and the presumed consent of the people rather than upon his "war powers", the Supreme Court seemed to take the view that the war powers might continue to be the basis for the exercise of such governmental power even after the conclusion of peace. The Court held that the restoration of peace did not, as a matter of course, terminate a military government established over conquered territory, but that an inference that it was to continue subsequent to the conclusion of peace arose from the failure of the President or Congress to dissolve it. It therefore sustained the right of the President, in the exercise of his powers as Commander-in-Chief, not only to establish governments over conquered territory, but also to continue these governments in existence after the termination of the war, until Congress should act.[30]

Whether acting as civil or military governor, however, the military commander, as the President's most immediate representative, apparently may exercise as absolute powers in these _de facto_ governments as in the military governments during the war-time occupation.[31] In New Mexico, Governor Vigil continued in office as civil governor for some time after the ratification of the treaty of peace, but Colonel John Price, the military commander, exercised the real authority. He approved, by special order, the acts passed by the legislature elected under Kearney's organic law, and even abolished the offices named in the statutes (secretary, district attorney, and marshal).[32] Colonel John Munroe, when he became military commander in New Mexico, assumed both the title and functions of "civil/ and military governor", and continued to act as such until New Mexico became

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[30] _Cross v. Harrison_, 16 How., 164, 190, 193, 195 (1853); _Leitensdorfer v. Webb_, 20 How., 176, 178 (1857).
[31] Cf. _supra_, Ch. IX.
[32] Thomas, _op. cit._, 129; cf. _supra_, 180.

a territory in 1851.[33] Likewise in California, the military commander issued orders and decrees having the force of law; appointed special tribunals; defined the jurisdiction of the courts; organized a supreme court; appointed and removed officials; and, finally, ordered an election for delegates to a constitutional convention, submitted the constitution to the people, and declared it ordained and established nearly a year before the state was actually admitted by Congress.[34]

In the case of the territories acquired as a result of the Spanish-American War, Congress likewise failed to make immediate provision for their government, and the President therefore continued to exercise all the powers of government over those territories for some considerable time after the definitive conclusion of peace with Spain. Thus, in Porto Rico the military government instituted on October 18, 1898, continued to operate under the sole authority of the President until May 1, 1900, when it was superseded by the civil government established under the provisions of the Foraker Act.[35] The military governor, during that period, exercised absolute power over the affairs of the island, maintaining law and order, reorganizing the judiciary, reforming the criminal procedure, providing a new system of taxation, and gradually introducing free and self-governing institutions.[36] In the words of a native writer, the military governor, as the representative of the President, "had absolute and complete control, not only over the army, but also over the civil population of the island, and whatever orders he saw fit

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[33] Thomas, op. cit., 147.

[34] Ibid., 229-234, 264-265, 269, 273-275. Gen. Riley yielded his authority on Dec. 20, 1849, to Peter Burnett, the governor elected under this constitution, although California was not admitted till Sept. 9, 1850.

[35] Act of Apr. 12, 1900. 31 Stat. at L., 77.

[36] See Rowe, The United States and Porto Rico, 118-128, 190-191, 206-208.

to issue had the force of law."[37]

Cuba, though not ceded to the United States by the treaty of peace, was likewise kept under military occupation from the time of its seizure in 1898 until the inauguration of the republic on May 20, 1902; and during that time the President, through the Secretary of War and the military governor, administered the affairs of that island at his discretion. The suffrage qualifications were determined upon by "general agreement" of the military governor with "leading Cubans", while election laws and other statutes were promulgated, and the self-governing powers of the municipal governments were enlarged or the municipalities suppressed altogether by military order.[38] Finally, when the Executive deemed the time ripe for complete self-government, the military governor summoned a constitutional convention, determined the number and distribution of delegates, carefully instructed them as to their duties,[39] and saw to it that the provisions suggested by the Secretary of War as the

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[37] Pedro Capo-Rodriguez, in Am. Jour. Int. Law, IX, 904. In connection with the transfer of the government from the military to the civil authorities, there occurred an interesting illustration of the power of the military governor to meet an extraordinary situation. The civil officials provided for in the Foraker Act not having all been able to qualify by the time set for the transfer, and the military officers being forbidden by statute to hold civil office, the military governor on April 30 simply reorganized the military government so as to conform to the plan of the Foraker Act and appointed civilians to fill the offices until those selected by the President could qualify. See Rowe, op.cit., 134-136; Thomas, op.cit., 310.

[38] Of the 138 municipalities in Cuba, 56 were suppressed "on the ground that they had neither the resources nor population sufficient to maintain a well organized municipality." Gen. Leonard Wood, "The Military Government of Cuba", Ann. Am. Acad., XXI, 160-161.

[39] See order of July 25, 1900, calling the election for delegates; also the opening statement of the military governor to the convention, Nov. 5, 1900, in which he said: "Under the order pursuant to which you have been elected and convened you have no duty and no authority to take part in the present government of the island. Your powers are strictly limited by the terms of that order." Root, Military and Colonial Policy of the United States, 195, 196.

basis for the future relations between Cuba and the United States,[40] were adopted by the convention.[41] He also passed upon the constitution adopted by this convention, and not before it had been treated by him "as an acceptable basis for the formation of the new government" was the transfer to that new government permitted to take place.[42] In effect, the President not only exercised all the powers of government over the island of Cuba while it was under military occupation, but himself determined when and under what conditions such military occupation should cease and the troops and authority of the United States be withdrawn, the assumption of this authority being upheld by the Supreme Court as a legitimate function of the "political branch" of the Government, in this case the Executive.[43]

In the Philippines, the President likewise carried on the government for about two years after the definitive conclusion of peace, "untrammeled or unaided by any word from Congress." Although

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[40] Instructions of Secretary of War Root to Maj. Gen. Wood, Feb. 9, 1901. Root, op. cit., 208-212. With regard to these provisions, Secretary Root instructed Maj. Gen. Wood as follows: "These provisions may not, it is true, prove to be in accord with the conclusions which Congress may ultimately reach when that body comes to consider the subject, but as, until Congress has acted, the Executive must necessarily within its own sphere be controlled by its own judgment, you should be guided by the views above expressed." Ibid., 212. These provisions were, however, embodied in the famous Platt Amendment to the Act of Mar. 2, 1901. 31 Stat. at L., 895, 897.

[41] "On receipt of the instructions by cable I immediately assembled the Committee on Relations to Exist between Cuba and the United States and made known to them the five articles or provisions which, in the opinion of the Executive branch of the Government, represent the wishes of the United States in all that pertains to the proposed relations between the Government of the United States and the people of Cuba. I was particularly careful to impress upon them that Congress might in its wisdom insist upon different conditions or relations, but that the proposition submitted embodied those which in the opinion of the Executive branch of the Government should exist and that they were the only ones which they could at present consider." Maj. Gen. Wood to Secretary of War Root, Feb. 19, 1901. Root, op. cit., 186.

[42] Ibid., 215.

[43] Neely v. Henkel, 180 U. S., 109, 124 (1901).

Secretary of War Root announced that all formal and open resistance to the authority of the United States had terminated in the spring of 1900,[44] President McKinley, by virtue of his authority as Commander-in-Chief,[45] continued the military governor as the executive authority in the islands, but vested the legislative power in a civilian Commission.[46] He outlined the duties of this Commission and the general policy towards the Philippines in elaborate instructions, which came to be considered the "organic act of the Philippines",[47] and under which more than 400 laws were enacted "by authority of the President of the United States" and subject only to the approval of the Secretary of War.[48]

In 1901, however, the President was given express authority by Congress to govern the Philippines temporarily,[49] and was thus no longer forced to base his actions on his "war powers". Under this new authority, the Philippine Commission was continued as before, but the military and civil authority in the islands were still further separated, the military governor being relieved of all his civil duties, and the president of the Commission, Mr. Taft, being appointed civil governor, with power to exercise the executive au-

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[44] Root, op. cit., 238.

[45] "The sole power which the President was exercising in the Philippine Islands was a military power derived from his authority under the Constitution as Commander-in-Chief of the Army and Navy." Ibid., 252, 295.

[46] The second Philippine Commission, appointed Mar. 16, 1900, and composed of William H. Taft, Dean C. Worcester, Luke E. Wright, Henry C. Ide, and Bernard Moses. For the first Commission, see supra, 175, note 21.

[47] Instructions of Apr. 7, 1900. Root, op. cit., 287-294.

[48] Ibid., 294-295. "While the President vested and could vest in it no greater legislative authority than the military commander previously held, it has exercised that authority in accordance with legislative forms." Ibid., 254.

[49] By the so-called Spooner Amendment to the Act of Mar. 2, 1901. 31 Stat. at L., 895, 910.

thority in civil affairs heretofore exercised by the military governor.[50] The organization of separate executive departments and the creation of the office of vice-governor, were further steps in the development of civil government undertaken by the President by virtue of his general power as Chief Executive and the authority vested in him by Congress.[51]

Finally, the last insurgent leaders having surrendered in April, 1902,[52] and the Philippine Commission created by the President having been given express legislative sanction and authority,[53] the President, on July 4, 1902, terminated altogether the office of military governor in the Philippines, made the military forces subject to the call of the civil authorities "for the maintenance of law and order and the enforcement of their authority",[54] and thus, in the words of Secretary Root, "a complete system of civil government, *built up under the authority of the President*, was in operation, ready to go on under the authority of Congress."[55]

In other matters, also, the President may be said to have considerable power with regard to reconstruction after war. Several of the most important war enactments of Congress, conferring large powers upon the President during the recent war with Germany and Austria-Hungary, show that Congress contemplated a period of recon-

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[50] See order of June 21, 1901. Root, *op. cit.*, 262. Taft was inaugurated civil governor on July 4, 1901. On the same day Maj. Gen. Chaffee succeeded Maj. Gen. MacArthur as military governor, but with duties applying only to the unpacified regions of the Philippines.

[51] *Ibid.*, 262-287. Luke E. Wright was appointed vice-governor, the order reading "by virtue of the authority vested in me as President of the United States." *Ibid.*, 264.

[52] *Ibid.*, 316-317.

[53] Philippine Government Act of July 1, 1902. 32 *Stat. at L.*, 691. From this time the laws passed by the Philippine Commission were enacted "by authority of the United States", instead of "by authority of the President." Root, *op. cit.*, 295.

[54] Order of July 4, 1902. *Ibid.*, 317-318.

[55] *Ibid.*, 318.

struction during which the President might continue to exercise those war powers and gradually bring about an adjustment to the normal conditions of peace.

Thus, by the terms of the Emergency Shipping Fund Act and of the Overman Act, the President was expressly authorized to exercise the powers therein granted for a period of six months after the termination of the war by the proclamation of a final treaty of peace; while, by the Railway Control Act, he was empowered to continue his control of the railroads for a period of one year and nine months after that event.[56] The long delay in securing the final termination of the state of war made the armistice period virtually a period of reconstruction, during which President Wilson exercised his war powers as he deemed such exercise necessary to bring about the readjustment to normal conditions. The control of the railroads was thus continued until March 1, 1920, frankly not as a war measure, but "to render an adequate and convenient transportation service at reasonable cost."[57]

Similarly, the President revived and exercised his war powers under the Food and Fuel Control Act at various times during this reconstruction period. Thus, some of the war-time food restrictions, which had been lifted shortly after the signing of the armistice, were revived about a year later, and the powers of the Food Administrator transferred by executive order to the Attorney-General in an attempt to avert a sugar famine and lower the high cost of living.[58] The war-time powers of the Fuel Administration were likewise revived by executive order of October 30, 1919, and exercised

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[56] Acts of June 15, 1917; Mar. 21, 1918, (Sec. 14); May 20, 1918 (Sec. 1). Wigmore, *Source-Book of Military Law and War-Time Legislation*, 484, 583, 586.

[57] Statement of Director General Hines. *Supra*, 247, note 78.

[58] *N. Y. Times*, Nov. 22, 1919; cf. *supra*, 235.

to meet the situation caused by the coal strike of that time, and later (December 10), in that connection, virtually transferred to a wage commission of three men.[59] By executive order of February 28, 1920, the President again formally continued the Fuel Administration, "because of the present emergency, and in order to insure an adequate supply and equitable distribution, and to facilitate the movement, and to prevent locally or generally, scarcity of coal"; and vested its powers in a commission of four men.[60] Finally, only a month later (April 1), President Wilson accepted and affirmed the majority report of the commission appointed in December to fix miner's wages, and at the same time removed all governmental control over the fuel industry, except as to export coal.[61]

The exercise of these war powers by President Wilson is in every instance clearly warranted by the fact of the continuance of the state of war. However, but for the unusual and unexpected delay in terminating that state of war, these same problems and situations would have arisen during a time of technical as well as virtual peace, and they seem to demonstrate the necessity for an extension of the President's war powers into the period of reconstruction and readjustment, in order to meet effectively just such problems that arise out of war conditions. Except in the extraordinary cases mentioned, where the courts have held that necessity and the failure of Congress to act are a sufficient justification, the exercise of such power is dependent upon definite statutory autho-

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[59] Supra, 236-237 ; see statement of the former Fuel Administrator, Dr. Garfield, before the Senate Committee on Interstate Commerce, Dec. 13, 1919. N. Y. Times Current Hist. Mag., XI, Pt. 2, 30 (Jan., 1920). The commission was composed of Henry M. Robinson, John P. White, and Rembrandt Peale.

[60] N. Y. Times, Feb. 29, 1920. This commission was composed of A. W. Howe, Rembrandt Peale, F. M. Whittacker, and J. F. Fisher.

[61] See announcement in United States Bulletin, Mar. 29, 1920.

rity. The grant of such authority during the recent war is likely to have set a precedent that will be followed without much question in case of similar emergencies in the future.

The exercise of war powers during a period of reconstruction cannot be a source of danger, since it is always subject to a check by Congress. In no case can it be said that the President has any absolute powers with regard to reconstruction problems, as he has with regard to the actual conduct of the war. It has been noted that any powers in this respect may be exercised by the President only because of the failure of Congress to act, or by virtue of express statutory authority. Hence, Congress may at any time check any undue exercise of Executive power, either by taking definite action itself in the one case or by repealing its grant of power in the other.

Chapter XVI.

Conclusion

In summing up the results of this study, it may be noted again that the war powers of the President are derived principally from the Constitution. There is only one clause in that instrument, however, which expressly confers upon the President any power relating directly to war, namely, the clause which makes him Commander-in-Chief of the army and navy of the United States and of the militia of the several states when called into the actual service of the United States. Even the powers of the President as Commander-in-Chief are undefined in the Constitution, and hence it has been necessary to determine them more exactly by reference to international law and practice, to the statutes of the United States, to custom and usage, and to authoritative opinion.

However, the Constitution vests in the President other powers and duties which do not necessarily or primarily imply the existence of war for their exercise, but which may have a close relation to the initiation and conduct of war, and must therefore be considered in this connection. The most important of these are the powers of the President with regard to foreign relations and the powers that may be derived from his position as the Chief Executive of the nation. The scope of these powers is likewise undefined in the Constitution, and must again be determined through necessary implication and authoritative interpretation. Other powers of the President that have been noted as bearing upon the conduct of war are his powers of appointment and removal, his power of pardon, and his power and influence with regard to legislation.

Again, other clauses of the Constitution, while not ex-

pressly conferring any power upon the President, have been taken into account because they may, by necessary implication, add to his war powers. These are particularly the clauses which relate to the suspension of the writ of habeas corpus, and guarantee to the states a republican form of government and protection from invasion, insurrection and domestic violence.[1] Those clauses of the Constitution which confer powers relating to war expressly upon Congress have also been taken into consideration.

From our study of these express powers, as interpreted and applied in the various emergencies that have arisen, it may be said, in the first place, that the President, through his control of foreign relations, his power as Commander-in-Chief, and his influence and authority as Chief Executive, may virtually compel or prevent a war, at his discretion. He may very largely influence a declaration of war by Congress, and he may even begin a "defensive" war without such a declaration.

In the second place, it is the President, not Congress, who wages war, his military powers as Commander-in-Chief making him supreme in that respect and solely responsible for the actual conduct of war. His constitutional powers in this regard are customarily supplemented with considerable statutory authority, so that he has large powers with regard to raising and organizing the armed forces; he directs and controls all military operations; he exercises complete powers of military jurisdiction; and he establishes and carries on military government -- in fact, when a war has been declared or begun, the President may do practically anything, in a military sense, that he deems necessary to carry on that war to a

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[1] Cf. supra, 12, notes 34-36.

successful conclusion, subject only to the rules of civilized warfare.

Thirdly, the civil powers of the President are greatly increased in time of war over those powers in time of peace. Principally by virtue of statutory authority, but in part also by virtue of his express constitutional power of appointment, and his implied powers of removal and direction, together with his authority as Commander-in-Chief, the President, during such a period of emergency, is vested with almost complete control of the administrative machinery of the government; he exercises extensive powers of police control and supervision over individual action and opinion; and he may even, as in the recent world war, practically control the economic resources of the country.

In the fourth place, the President, as Commander-in-Chief, determines when and upon what conditions hostilities are to cease; and, since a treaty of peace is the only constitutional method provided for terminating a war on the part of the United States, he may also, by virtue of his treaty-making powers, very largely determine the definitive conditions of peace and the time for the final termination of the state of war.

Finally, it has been pointed out that the President may, in the absence of Congressional action, provide for and carry on the government of territory that may have been acquired as a result of war, and in other ways exercise certain of his war powers during the period of reconstruction following war, in order to meet extraordinary situations that may arise during such a period, and to bring about a gradual readjustment to the normal conditions of peace.

At least one definite conclusion can be drawn from this

study, namely, that the so-called "war powers" of the Executive constitute no isolated group of powers derived from a single source, but that they are intimately connected with and indeed derived from practically every phase of the President's authority. In general, the war powers of the President cannot be precisely defined, but must remain somewhat vague and uncertain. "The Constitution", says President Wilson, "is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age."[2] That statement is particularly true of that portion of the Constitution dealing with the war powers. The exigencies and circumstances of war can never be foreseen or provided against in advance, to any appreciable extent. Hence, the interpretation of what may actually be included within the war powers depends very largely on the gravity of the particular occasion for their exercise and the peculiar necessities that arise in connection.

Thus it was, for example, that the power to arm merchant ships in defense was first asserted by President Adams as the prerogative of the Executive, under the stress of the troubles with France in 1798. Likewise, the power of the Executive with regard to military government in occupied territory was firmly established as a part of American constitutional law by President Polk, because of the necessities of the war with Mexico. Under President Lincoln and the stress of civil war were developed especially the powers of censorship and arbitrary arrest, and of military government over territory within the United States; while under President Wilson, probably the control exercised by the Executive over the administrative machinery of the government and the economic resources of the

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[2] Constitutional Government in the United States, 69.

country are the outstanding features of the war powers, as exercised during the recent world war.

Clearly, the tendency has been towards a great increase in the war powers of the Executive as compared with those of Congress, a tendency quite inevitable when one considers the growing complexity of war, with its consequent greater need for singleness of direction, unity of command, and the coordination of every resource of the nation. On the other hand, there is also a tendency to pay more attention to constitutional forms in bringing about this necessary concentration of power, rather than to rely upon an arbitrary exercise of power when the occasion may demand. Thus, while President Wilson undoubtedly exercised a vastly greater power during the recent world war than did President Lincoln during the Civil War, he was careful to consult with Congress almost continuously during the war, and to secure express authority from that body in almost every case where there might be any doubt as to his own power to act without such authority; while President Lincoln, in cases of doubtful authority and even of undoubted lack of authority, such as increasing the regular armed forces, suspending the writ of habeas corpus, and issuing the emancipation proclamation, usually acted first and secured the sanction of law afterwards, if at all.

Although, as has been noted, many of the President's war powers are derived from express statutory grants rather than directly from the Constitution, and are therefore subject to modification at the discretion of Congress, it may safely be assumed that powers thus granted will, upon occasion, be granted again with more readiness, the necessity for such exercise of power having been too clear-

ly demonstrated in the past. It is probable, for example, that Congress would not hesitate, in case of a future war of similar importance, to vest the President immediately with the powers exercised by President Wilson under the Food and Fuel Control Act, the Railway Control Act, or the Trading with the Enemy Act. A precedent of centralization of power and concentration of effort in time of war is not apt to be ignored, but, on the other hand, is more liable to be accepted as a principle to be followed in the future, if occasion arises. It may be noted here that, in the parliamentary governments of Europe, such as Great Britain, where the direction of war is vested in a Cabinet of several members rather than in a single Executive, the tendency, as shown especially during the recent world war, has been distinctly towards a concentration of the war powers in the hands of a smaller group, approaching singleness of control. In the United States, the experiences of a multiple direction of war through the activities of the Congress during the Revolution and of the Joint Committee during the Civil War, have not been forgotten, but were sufficient to prevent the institution, during the recent war, of any similar checks on single Executive authority.

While the President, in critical times, thus becomes practically a dictator, that does not necessarily mean a disregard of the principles of constitutional government nor require further limitations of his war powers. One of the foremost students of contemporary American politics says that the ability to act promptly and energetically in the presence of emergency being of paramount importance, "no government can survive that excludes dictatorship when the life of the nation is at stake", and he points out

that the real difference between a despotism and constitutional government lies in the location of responsibility rather than in the limitation of power.[3]

Certainly the tendency in the United States has been towards the concentration of the war powers in the hands of the Executive. More and more, however, has that been done by express legal sanction; and more and more is the responsibility for anything in the way of executive action being definitely located in the President, so that, at the most, the President may be said to be in time of war, a "constitutional dictator". Even so, the authority of the Executive under his war powers is so extensive that one can only reflect the words of James Bryce when he wrote about the President that "when foreign affairs become critical, or when disorders within the Union require his intervention, . . everything may depend on his judgment, his courage, and his hearty loyalty to the principles of the Constitution."[4]

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[3] H. J. Ford, "The Growth of Dictatorship", in Atlantic Monthly, CXXI, 632-640 (May, 1918), esp. 634.

[4] American Commonwealth, I, 67.

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Clarence Arthur Berdahl was born in Minnehaha County, South Dakota, June 14, 1890. His early education was obtained in the common schools of Minnehaha County and at Augustana College (academy), Canton, South Dakota, from which he was graduated in 1911 as valedictorian. In the fall of 1911 he entered St. Olaf College, at Northfield, Minnesota, on a scholarship, and at the end of his Junior year received one of the four Talla scholarships. He was graduated in 1914, receiving the degree of Bachelor of Arts with highest honors.

After graduation, he taught History and Civics for one year in the High School at Fergus Falls, Minnesota; and spent some time in the government service at Washington, as clerk in the Archives Division of the War Department and as assistant in the Periodicals Division of the Library of Congress. During the school year of 1916-1917, he took up graduate work in History, Political Science, and Economics, at the University of South Dakota, receiving the degree of Master of Arts in June, 1917. In October, 1917, he entered the University of Illinois, where, except for a period of service in the army, he has since held a Fellowship in Political Science. In the spring of 1920, he was elected a member of Phi Beta Kappa.

Since 1917 he has assisted in compiling the lists of publications of political interest for the American Political Science Review; in the summer of 1919 he assisted Professor Cole in editing the Illinois Constitutional Debates of 1847; and recently he has published an article on the Richards primary law of South Dakota, in the American Political Science Review (Feb.,1920).

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